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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-697

ENCYCLOPAEDIA BRITANNICA, INC. AND BRITANNICA HOME LIBRARY SERVICES, INC.,

Petitioners

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
The FTC Proceedings	6
The Court of Appeals Decision	9
Reasons for Granting the Writ	11
I. The Writ Should Be Granted to Decide the Important First Amendment Question Left Open in *Virginia State Board of Pharmacy* Which Should Now Be Settled Because of the FTC's Widespread Program of Seeking Under Its "Fencing-In" Doctrine to Dictate the Form and Content of Commercial Communications	13
A. The Writ Should Be Granted to Resolve the Question Left Open in *Virginia State Board of Pharmacy*	13
B. The Writ Should Be Granted Because of the FTC's Customary Imposition of Overbroad Prior Restraints in the Form of Affirmative Disclosure Orders Under Its "Fencing-In" Doctrine	16
II. This Court Should Grant the Writ to Resolve the Serious Conflict Between the Circuits on the Scope of Review of FTC Orders Prescribing the Content of Commercial Communications	19
III. The Writ Should Be Granted Because the Judgment Below Conflicts with the First Amendment Principles Enunciated by This Court Which Are Applicable to a Prior Restraint on the Communications of a Publisher Engaged in the Distribution of its Publications	24
IV. The Writ Should Be Granted to Decide the Important Issue of the FTC's Statutory Authority to Prescribe Conduct Which Unnecessarily Threatens the Continued Viability of an Established Method of Doing Business	27
Conclusion	30

TABLE OF AUTHORITIES CITED.

Cases

Bantam Books Inc. v. Sullivan, 372 U. S. 58 (1963) 25
Bates v. State Bar of Arizona, 433 U. S. 350 (1977) 13
Beneficial Corp. v. FTC, 542 F. 2d 611 (3d Cir. 1976), *cert. denied*, 430 U. S. 983 (1977) ..2, 3, 10, 12, 16, 19-23
Engel v. Vitale, 370 U. S. 421 (1962) 25
FTC v. Eastman Kodak Co., 274 U. S. 619 (1927) 28
FTC v. National Lead Co., 352 U. S. 419 (1957) 15
FTC v. Royal Milling Co., 288 U. S. 212 (1933) 27
Gooding v. Wilson, 405 U. S. 518 (1972) 26
Griswold v. Connecticut, 381 U. S. 479 (1965) 24
Jacob Siegel Co. v. FTC, 327 U. S. 608 (1946) 2, 9, 12, 19, 21, 22, 23, 27
Jay Norris, Inc. v. FTC, 598 F. 2d 1244 (2d Cir. 1979) 16
Miami Herald Pub. Co. v. Tornillo, 418 U. S. 241 (1974) 25
National Commission on Egg Nutrition v. FTC, 570 F. 2d 157 (7th Cir. 1977), *cert. denied*, 439 U. S. 821 (1978) 10, 16
Near v. Minnesota, 283 U. S. 697 (1931) 25
Organization for a Better Austin v. Keefe, 402 U. S. 415 (1971) 25
Porter & Dietsch, Inc. v. FTC, 1979-2 Trade Cas. (CCH) ¶ 62, 796 (7th Cir. 1979) 16
Procunier v. Martinez, 416 U. S. 396 (1974) 26
Shelton v. Tucker, 364 U. S. 479 (1960) 26
Smith v. California, 361 U. S. 147 (1959) 24

Standard Oil of California v. FTC, 577 F. 2d 653 (9th Cir. 1978) 16
U. S. v. National Society of Professional Engineers, 555 F. 2d 978 (D. C. Cir. 1977), *affirmed on other grounds*, 435 U. S. 679 (1978) 16
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U. S. 748 (1976) 2, 11, 13, 15, 16, 23
Warner-Lambert Co. v. FTC, 562 F. 2d 749 (D. C. Cir. 1977), 435 U. S. 950 (1978) 16
West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943) 14, 25
Wooley v. Maynard, 430 U. S. 705 (1977) 14, 25

FTC Proceedings

In re American Home Products Corp., No. 8918 (Sept. 1, 1978) (initial decision) 17
In re Amrep Corp., No. 9018 (July 18, 1979) (initial decision) 17
In re Arthur Murray Studio, Inc., 78 F. T. C. 401 (1971), *aff'd*, Arthur Murray Studio v. FTC, 458 F. 2d 622 (5th Cir. 1972) 17
In re Baldwin Bracelet Corp., 61 F. T. C. 1345 (1962), *aff'd*, 325 F. 2d 1012 (D. C. Cir. 1963), *cert. denied*, 377 U. S. 923 (1964) 19
In re Bristol-Myers Co., No. 8917 (Sept. 28, 1979) (initial decision) 17
In re Crowell-Collier Publishing Co., 75 F. T. C. 241 (1969), *aff'd*, P. F. Crollier & Son Corp. v. FTC, 427 F. 2d 261 (6th Cir. 1970) 17

In re Crown Central Petroleum Corp., 84 F. T. C. 1493 (1974), *modified*, 88 F. T. C. 210 (1976) 19

In re Firestone Tire & Rubber Co., 81 F. T. C. 398 (1972), *aff'd*, 481 F. 2d 246 (6th Cir. 1973), *cert. denied*, 414 U. S. 1112 (1973) 18

In re General Transmissions Corp., 73 F. T. C. 399 (1968) 19

In re Great Atlantic & Pacific Tea Co., No. 8916 (March 25, 1975) 18

In re Grolier, Inc., 91 F. T. C. 315 (1978) 17

In re Horizon Corp., No. 9017 (Sept. 21, 1979) (initial decision) 17

In re Hollywood Carpets, Inc., 86 F. T. C. 784 (1975) .. 19

In re Household Finance Corp., No. 911 (March 16, 1979) (initial decision) 18

In re ITT Continental Baking Co., 83 F. T. C. 1105 (1973), *rev'd in part*, 532 F. 2d 207 (2d Cir. 1976).. 19

In re Kroger Co., No. 9018 (June 11, 1979) (initial decision) 18

In re Manco Watch Strap Co., 60 F. T. C. 495, *modified*, 61 F. T. C. 298 (1962) 19

In re Marketing Development Corp., No. 9067 (June 7, 1979) 19

In re Mather Hearing Aid Distrib., Inc., 78 F. T. C. 709 (1971) 17

In re National Housewares, 90 F. T. C. 512 (1977).... 17

In re Peacock Buick, Inc., 86 F. T. C. 1532 (1975) 18

In re Raymond Lee Organization, Inc., 92 F. T. C. 489 (1978) 17

In re Simeon Management Corp., 87 F. T. C. 756 (1976), *aff'd*, Simeon Management Corp. v. FTC, 579 F. 2d 1137 (9th Cir. 1978) 18

In re S. S. S. Co., 73 F. T. C. 1058 (1968), *enforced*, 416 F. 2d 226 (6th Cir. 1969) 17

In re State Credit Control Board, 7 F. T. C. 1318 (1966) 18

In re Tashof, 74 F. T. C. 1361 (1968), *aff'd*, 437 F. 2d 707 (D. C. Cir. 1970) 19

In re Taylor-Friedsam Co., 69 F. T. C. 483 (1966) 18

In re Thermochemical Products, Inc., 76 F. T. C. 107 (1969) 19

In re Travel King, Inc., 86 F. T. C. 715 (1975) 18

In re U. S. Life Credit Corp., 91 F. T. C. 984 (1978), *vacated*, ... F. 2d ..... (5th Cir. 1979) 18

In re Universal Credit Acceptance Corp., 82 F. T. C. 570 (1973), *rev'd in part on other grounds*, Heater v. FTC, 503 F. 2d 321 (9th Cir. 1974) 19

In re Western Radio Corp., 63 F. T. C. 882 (1963), *modified on other grounds*, Western Radio Corp. v. FTC, 334 339 F. 2d 937 (7th Cir.), *cert. denied*, 381 U. S. 938 (1965) 19

Statutory and Constitutional Provisions

First Amendment ..... Passim

15 U. S. C. § 45 ..... Passim

Other

Consumer Information Remedies (FTC Staff Publication, 1979) 17

Elman, "The New Constitutional Right to Advertise," 64 *ABA Journal* 206 (February, 1978) 15, 16

Emerson, *The System of Freedom of Expression* (1970).. 24

Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on Senate Bill 3744 (74th Congress) (1937) 28

Note, 44 *Univ. Chi. L. Rev.* 205 (1976) 24

Oversight Hearings on the Federal Trade Commission Before the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation (90th Congress) (1979) 29

Pederson & Wright, *Salesmanship Principles and Methods* (1971) 7

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners Encyclopaedia Britannica, Inc. and its subsidiary Britannica Home Library Services, Inc. (hereinafter referred to jointly as "Britannica") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming an order issued by the Federal Trade Commission.

OPINIONS BELOW.

The majority and dissenting opinions in the Court of Appeals, not yet reported officially but reported unofficially at 1979-2 Trade Cas. (CCH) ¶ 62,793, are set forth in the Appendix (pp. A1-A25). The administrative proceedings before the Federal Trade Commission are reported at 87 F.T.C. 421 and are set forth in the Appendix (pp. A26-A184).

JURISDICTION.

The judgment of the Court of Appeals was entered on August 2, 1979. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

I.

In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976), which held that non-deceptive commercial speech is entitled to First Amendment protection, this Court expressly referred to and left unresolved the question whether, and to what extent, the government may affirmatively require a commercial communication to appear in a certain "form" and to "include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Id.* at 771 n. 24.

The first question presented in this case is whether the Federal Trade Commission's "fencing-in" doctrine, under which the FTC asserts the authority to issue remedial orders which reach beyond practices actually found to be deceptive, violates the First Amendment when it is applied to require a publisher to include in its sales communications verbatim affirmative statements dictated by the FTC which are not necessary to prevent deception.

II.

The second question presented, on which the Court should grant the writ to resolve the sharp conflict between the decision of the Seventh Circuit below and the decision of the Third Circuit in *Beneficial Corp.* v. *FTC*, 542 F. 2d 611 (3d Cir. 1976), *cert. denied*, 430 U. S. 983 (1977), is whether the appropriate standard of judicial review of FTC remedial orders restricting commercial speech is the new more exacting one formulated in *Beneficial* for commercial speech cases or the old deferential one formulated in *Jacob Siegel Co.* v. *FTC*, 327 U. S. 608 (1946), and applied by the Seventh Circuit below. This is

the precise issue on which the FTC sought certiorari in *Beneficial* before a conflict developed.

III.

The third question presented, on which review is required because the decision below is in direct conflict with established First Amendment principles enunciated by this Court, is whether a prior restraint on the truthful communications of a publisher engaged in the distribution of its publications, which prior restraint has not been demonstrated to be necessary to achieve a valid governmental objective, is constitutional under the First Amendment.

IV.

The fourth question presented is the unresolved statutory issue whether the FTC has the power under the Federal Trade Commission Act to issue an order which destroys the established manner of doing business of an enterprise when such drastic interference has not been demonstrated to be necessary to accomplish the FTC's remedial purpose.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provision involved is the First Amendment which provides in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech or of the press . . ."

The statutory provision involved is the Federal Trade Commission Act, 15 U. S. C. § 45, which is set forth in the Appendix (pp. A184-A192).

STATEMENT OF THE CASE.

Britannica seeks review by this Court of a decision of the Court of Appeals for the Seventh Circuit affirming, by a 2-to-1 vote, an order (the "Order") of the Federal Trade Commission

("FTC") which directs Britannica to make affirmative statements in words and form dictated by the FTC in all its future communications to prospective purchasers of its publications.*

Britannica publishes the Encyclopaedia Britannica, widely recognized as the outstanding comprehensive reference work in the English language. Its principal method of marketing this reference work has for many years been to identify interested potential customers by seeking responses to promotional advertisements offering information, and then to visit them at their homes for sales presentations. Britannica's business depends upon these two brief opportunities to communicate its sales message to prospective customers. The FTC found that Britannica encouraged customers to listen to its sales presentations through use of misleading techniques in the advertisements and at home visits and it ordered Britannica to stop such misleading sales devices. Britannica does not contest this part of the Order. However, the Order goes on to require Britannica to make verbatim affirmative statements in its ads and at-home presentations which will actively *discourage* the customer from listening to Britannica's sales presentations.** It is these intrusive affirmative requirements, which go far beyond what is necessary to prevent deception, which Britannica claims violate the First Amendment and exceed the FTC's statutory authority.

Specifically, the challenged provisions of the Order require every Britannica sales representative to direct every prospective customer answering the door to read a *Miranda*-like warning card starkly proclaiming, in 10-point boldface type, the representative's identity, business affiliation, and sales purpose —and nothing else—in words and format selected by the FTC, before the representative may engage in any sales presentation. The card-at-the-door would appear as follows:

* The complete text of the Order appears in the Appendix (pp. A37-A51).

** Studies indicate that the Order would more than cut in half the number of consumers responding to Britannica's print advertising. See p. 8 *infra*.

ENCYCLOPAEDIA BRITANNICA, INC.

JOHN DOE

ENCYCLOPEDIA SALES REPRESENTATIVE

THE PURPOSE OF THIS REPRESENTATIVE'S CALL IS TO SOLICIT THE SALE OF ENCYCLOPEDIAS.

In addition, the Order directs Britannica to include in all advertising or promotional material containing an offer of books or information and seeking a reply from the customer the following exact words in the following precise format:

> **NOTICE TO CONSUMER—PERSONS WHO REPLY AS REQUESTED MAY BE CONTACTED BY A SALESPERSON FOR THE PURPOSE OF SELLING. . .***

Britannica offers for sale a product which many informed members of the public decide to purchase once they have listened to Britannica's sales messages. The words and conduct required by the Order, however, convey the impression that Britannica and its encyclopedia are, in the words of the dissenting judge below, "afflicted with a strange marketplace malady." (Dissenting opinion of Wood, J., at p. A23). Britannica does not wish to express its messages in the form dictated by the FTC. It does not wish, for example, to introduce its sales representatives as persons intending to "solicit"—a word defined in Webster's New Collegiate Dictionary, inter alia, as meaning "to entice or lure esp. into evil."

* A similar prescribed "warning," in bold-face type, is required to be included on any return card or coupon attached to the promotional material.

The utterances required by the Order are not necessary to prevent deception. Salesmen are not generally required to engage in a comparable procedure when contacting their customers, but no one would seriously suggest that their customers are thereby being deceived. Yet the Order—justified by the FTC under its "fencing-in" doctrine by which remedial orders may extend beyond practices found to be unlawful—bars all communications, irrespective of their truthfulness, which do not comply with the precise specifications as to wording and form dictated by the FTC.

Britannica submits that this unnecessary interference with its right to use words of its own choosing in speaking about its publications violates the First Amendment and exceeds the remedial authority of the FTC under the Federal Trade Commission Act.

The FTC Proceedings.

A complaint against Britannica was issued by the FTC on December 11, 1972. On December 16, 1974, an FTC administrative law judge ("ALJ") entered his findings, two portions of which formed the basis for the challenged provisions of the Order.

First, the ALJ found that in contacting prospective purchasers at their homes, Britannica sales representatives "misrepresented and failed to disclose" their sales purpose, frequently by representing that they wished to conduct an advertising survey (pp. A82-A86) or to deliver a prize or certificate of some nature. (pp. A86-A91)*

Second, the ALJ found that Britannica utilized magazine and direct mail advertising, inviting readers to send in response cards in order to receive free books or information concerning Britannica's products, without disclosing in the advertising that persons responding to such advertisements would be contacted

* Prizes or gifts were in fact delivered; however, the ALJ found that such visits were simply a method of gaining entrance for the purpose of selling.

by salesmen. (pp. A110-A112) He found that Britannica's use of the terms "send" and "direct from the publisher" affirmatively misrepresented that the free information would arrive by mail rather than by personal delivery by a salesman. (pp. A111-A112) The ALJ also found that contest entry cards similarly failed to disclose Britannica's sales purpose, and that the term "no obligation" and the statement that winners would be notified by telephone misrepresented the fact that winners would receive their prizes directly from a Britannica sales representative. (p. A112)*

Concluding that such practices violated Section 5 of the Federal Trade Commission Act, the ALJ included in the Order express prohibitions against future representations that Britannica sales representatives were: (1) engaged in any endeavor other than door-to-door sale of encyclopedias, (2) conducting a survey or other information-gathering activity, or (3) calling on a prospective customer for the primary purpose of delivering prizes or other items. (p. A41) Britannica does not challenge these prohibitions.

However, the ALJ then proceeded to go beyond the prohibition of communications found to be deceptive and affirmatively required Britannica and its salesmen to speak the words, quoted above, chosen by the FTC. The ALJ did this over Britannica's contention, with respect to the at-home visits, that the conduct found deceptive could be remedied in a far less intrusive manner by a simple cease and desist order forbidding Britannica salesmen from claiming that the purpose of their visits was anything other than to sell; or at most by an order requiring salesmen to orally disclose their identity, affiliation, and sales objective or requiring them to present an ordinary business card stat-

* There was never any claim that Britannica failed to deliver booklets or information to customers who requested them or that the contests were themselves in any way deceptive. The only claim, and the only finding, was that it was deceptive to offer booklets or prizes implying that they would come only through the mail, without disclosing in writing that those who responded would be placed on a list of prospective customers to be contacted by a salesman.

ing their identity, affiliation, and occupation as Britannica sales representatives.*

Similarly, with respect to its promotional ads, Britannica argued that the required disclosure—that responding persons might be contacted by a salesman—could be included in its advertising in any one of a variety of ways which would not so severely inhibit response as the rigid and intrusive "warning" language and format. For example, the statement "Responding persons may be contacted by a Britannica representative to see if they would like further information about Britannica's products" was suggested by Britannica as an alternative.**

In rejecting these suggested alternatives and in refusing to limit the Order to what was necessary to prevent deception, the ALJ relied on the FTC's "fencing-in" doctrine (p. A156) stating:

> "'. . . once the Government has successfully born the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.'" (p. A158)

Without discussion of the proposed alternative forms of disclosure, the ALJ stated that "No satisfactory alternatives are suggested." (p. A160)

On appeal to the FTC, Britannica renewed its objections to the portions of the Order which affirmatively required it to speak words chosen by the FTC. However, the FTC stated that the card-at-the-door "should suffice" to provide clear and conspicuous disclosure of Britannica's sales objective (pp. A30-A31) and that affirmative disclosure that a sales representative may call was necessary in the promotional advertisements. (p. A36) The FTC took it upon itself to draw the extraordinary conclusion that the language it required Britannica to speak was not "negative" (p. A36)* and, without even referring to the alternative forms of disclosure suggested by Britannica, it proceeded to uphold the Order with one minor exception.**

* Standard works on marketing underline the importance of the manner in which such initial contact is made. See, *e.g.*, Pederson & Wright, *Salesmanship Principles and Methods,* 320-21 (1971):

> "The first few seconds that a salesman spends with a prospect often makes or breaks a sale. . . . A negative first impression . . . sets up a barrier which may never be hurdled."

** Britannica urged the Seventh Circuit that the case be remanded to the FTC so that Britannica could present evidence of copy testing which has shown that inclusion of the "warning" in the form prescribed by the Order results in a drastic decline (substantially in excess of 50%) in the number of persons responding to Britannica's advertising.

The Court of Appeals Decision.

Britannica petitioned for review in the Seventh Circuit which upheld the Order, in a 2-to-1 decision, on August 2, 1979. Despite the First Amendment issues raised by the Order, the Court began its analysis by endorsing the *Siegel* *** standard of review, which accords "wide latitude" to the FTC in framing remedial orders. It stated "once a violation of the Act has been found, our role in reviewing the remedy is a narrow one" (p. A9), and that it was sufficient that "the requirement of the disclosures on initial contact and in the so-called promotional materials were reasonably related to the deceptive practices found." (p. A10) Despite the fact that the Order dictated the wording of a sales communication to an extent never before approved by any court, the majority expressed "no hesitancy in concluding" that the reasonable relation standard had been satisfied and affirmed the Order on the ground that the FTC had not "abused its discretion." (pp. A10-A11) In so holding, the majority expressly relied upon the FTC's "fencing-in" rule, which asserts the FTC's authority to fashion a remedial order whose provisions

* No decision of this Court has ever intimated that the First Amendment permits the government to determine whether certain speech is "positive" or "negative."

** The requirement that the 3-by-5 card state that "This card should be kept as part of your permanent records of this transaction" was deleted because, in the FTC's opinion, it "did not appear to be necessary in order to provide a clear and conspicuous disclosure of the nature and purpose of the call." (p. A30)

*** *Jacob Siegel Co.* v. *FTC,* 327 U. S. 608 (1946).

extend beyond the particular practices held to be unlawful. The majority stated: " 'Having been caught violating the Act, respondents "must expect some fencing it." ' . . ." (p. A10)

The majority rejected Britannica's contention that the affirmative disclosure requirements violate its First Amendment right to engage in truthful communications of its own choice concerning its publications. It concluded that, as the Order neither required Britannica to argue the opposing side of a controversy contrary to its beliefs nor required the deletion of a copyrighted advertising phrase (such orders had been partially or wholly overturned on appeal in *National Commission on Egg Nutrition* v. *FTC,** and *Beneficial Corp.* v. *FTC,*** respectively), the Order was not impermissibly broad. (p. A15) With respect to Britannica's proposed alternative methods for curing the deception found by the FTC, the majority conceded, "It is true that the ALJ and the Commission made no express comparison" involving the proposed alternatives. (p. A11) However, it excused this failure stating, in utter disregard of First Amendment principles, that the issue was "only the form of the disclosure to be required." (p. A12) The majority found an "implication" that a comparison had been made by the FTC (although the FTC did not even refer to the alternatives) and made no such comparison itself. (p. A12)

Judge Wood dissented from the affirmance of the Order, stating that the alternative methods of disclosure suggested by Britannica had been ignored by the FTC in favor of a harsh remedy "without any apparent consideration of the adverse effects upon Britannica likely to result from its prescription" (p. A22):

> "In my view this is a case where an agency, though with good intentions, in its big brother role has unnecessarily

* 570 F. 2d 157 (7th Cir. 1977), *cert. denied,* 439 U. S. 821 (1978).

** 542 F. 2d 611 (3d Cir. 1976), *cert. denied,* 430 U. S. 983 (1977).

> intruded too far into the conduct of legitimate business." (p. A23.)

Focusing upon the severely intrusive nature of the Order, Judge Wood stated that:

> "The remedies appear to me to go beyond any reasonable cure . . . Britannica makes plain the severe, adverse business impact which can be anticipated by its use of the prescribed stark warnings and procedures. It seems to me that to require a salesperson to use the warning card will suggest to many prospects that the sales representative and his company are afflicted with some strange marketplace malady. Even prospects who are predisposed to acquire for themselves and families the wealth of information found in an encyclopedia may be expected to turn to some competitor who does not exhibit such abnormal and strange commercial behavior." (p. A23.)

Judge Wood concluded that enforcement of the Order should be denied and the case remanded to the FTC "for reconsideration of a more appropriate remedy to be supported by a rational analysis." (p. A24)

REASONS FOR GRANTING THE WRIT.

The judgment below places a prior restraint of extraordinary severity upon speech protected by the First Amendment. In permitting the FTC to prescribe in rigid detail the exact words that Britannica must use in communicating with prospective customers—words not necessary to prevent deception—the Seventh Circuit has answered incorrectly the precise question left open by this Court in *Virginia State Board of Pharmacy, supra,* and sanctioned a widespread and overbroad FTC effort, under its so-called "fencing-in" doctrine, to dictate the form and content of commercial communications. This effort has already resulted in at least 44 reported orders, seven of which have already been reviewed by courts of appeals. The total failure of the FTC to curb its application of the "fencing-in" doctrine and to tailor its program of affirmative orders dictating the

form and words of commerical messages to new commercial free speech requirements has resulted in at least a partial reversal —as overbroad—of five of the seven orders thus far subjected to judicial review.

In applying, at the FTC's urging, the old "wide latitude" standard of review of remedial orders formulated in *Jacob Siegel Co.* v. *FTC,* 327 U. S. 608, 611-13 (1946), the Seventh Circuit's decision squarely conflicts with the decision of the Court of Appeals for the Third Circuit in *Beneficial Corp.* v. *FTC, supra,* which announced a new more exacting standard of review of FTC orders applicable in commercial speech cases. By adhering to the old deferential standard of review of FTC remedial orders, the Seventh Circuit has failed to adjust the standard of judicial review to new commercial free speech requirements, and by attributing to the FTC a First Amendment expertise which it does not possess has let stand an order which is simply unconstitutional.

Further, the Seventh Circuit has approved such an FTC restraint here applicable not to an ordinary commercial message but to the communications of a publisher of important educational, literary and scientific works engaged in the distribution of its publications—an activity subject to the most rigorous standards of First Amendment protection under this Court's decisions.

Finally, and apart from the issues arising under the First Amendment, the judgment of the Seventh Circuit accepts as a lawful exercise of the FTC's remedial powers under Section 5 of the Federal Trade Commission Act an order which largely destroys an established and valuable mode of doing business developed over many years without any demonstrated necessity for such drastic intrusion in order to prevent deception or achieve any other valid remedial objective.

I. The Writ Should Be Granted to Decide the Important First Amendment Question Left Open in Virginia State Board of Pharmacy Which Should Now Be Settled Because of the FTC's Widespread Program of Seeking Under Its "Fencing-In" Doctrine to Dictate the Form and Content of Commercial Communications.

A. The Writ Should Be Granted to Resolve the Question Left Open in Virginia State Board of Pharmacy.

The decision of the Seventh Circuit in this case presents the First Amendment issue which this Court expressly referred to and left unresolved in *Virginia State Board of Pharmacy, supra,* regarding the permissible scope of governmental authority to dictate the exact wording and form of a commercial message. In *Virginia State Board of Pharmacy* this Court stated that certain attributes of commercial speech "may make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings and disclaimers, as are necessary to prevent its being deceptive." *Id.* at 722 n. 24.*

The issue is presented in this case because the FTC has applied, and the Seventh Circuit majority has upheld, a "fencing-in" order far broader than the conduct found to have been unlawful and far broader than is necessary to prevent deception. This has become a routine practice by the FTC despite the fact that a "fencing-in" order which commands the actual words to be used and the type size in which they must appear is the most severe form of prior restraint possible. In addition to putting words in the mouths of Britannica's salesmen which they do not

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* Subsequently, in *Bates* v. *State Bar of Arizona,* 433 U. S. 350 (1977), this Court again referred to and left open this question, stating: "We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled." *Id.* at 384.

choose to speak,* the affirmative disclosure requirement restrains the salesmen from introducing their sales presentation with any other words delivered in any other manner.

The judgment below requires Britannica to have its salesmen direct each and every prospective customer to read a 3-by-5 inch card on which is printed in 10-point type, in *Miranda*-warning fashion, the statement: "THE PURPOSE OF THIS REPRESENTATIVE'S CALL IS TO SOLICIT THE SALE OF ENCYCLOPEDIAS," and requires Britannica to include in its promotional advertisements the statement: "NOTICE TO CONSUMER—PERSONS WHO REPLY AS REQUESTED MAY BE CONTACTED BY A SALESPERSON FOR THE PURPOSE OF SELLING. . . ." Britannica has a product of undeniable quality, an encyclopedia, which members of an informed public often wish to buy, read and enjoy once they have received a fair presentation of Britannica's messages relating to it. The Order, however, requires Britannica to introduce its messages with words and conduct dictated by the FTC, giving the impression that Britannica and its encyclopedia are, in the words of the dissenting judge below, "afflicted with a strange marketplace malady." (p. A23) Britannica does not wish to express its sales messages in the form dictated by the Order. Britannica's salesmen do not wish, for example, to describe their conduct to a prospective customer as involving an effort to "solicit"—a word defined in the dictionary, *inter alia,* as meaning "to entice or lure esp. into evil." Nor does Britannica wish to introduce the message that a salesman may contact a customer with the bold-face warning phrase "NOTICE TO CONSUMER," as though the salesman will be carrying a communicable disease rather than useful information regarding a valuable and desirable product.

* The First Amendment does not generally leave "it open to public authorities to compel [a person] to utter what is not in his mind." *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 634 (1943). The First Amendment protects both "the right to speak freely and the right to refrain from speaking." *Wooley* v. *Maynard,* 430 U. S. 705, 714 (1977).

Utterances in the form dictated by the FTC are not necessary to avoid deception. Potential customers would not be deceived if visiting salesmen identified themselves as Britannica representatives in a less startling manner or if Britannica's promotional advertising disclosed in more normal language that a responding consumer might be called upon by a salesman. The prior restraint embodied in the Order was sustained, however, on the basis of the FTC's "fencing-in" doctrine under which, having found a violation, the FTC claims authority to draft an order broader than the conduct found to have been unlawful.

However valid the FTC's "fencing-in" doctrine may be in general, Britannica asserts that, following this Court's decision in *Virginia State Board of Pharmacy, supra,* the doctrine is unconstitutional where it bans broad ranges of truthful commercial messages.* Britannica asks this Court to grant its petition and to announce a rule that the government may not dictate the content of a commercial message unless it can demonstrate that such an order is necessary to prevent deception and that alternate forms of curative messages proposed by the speaker are inadequate.

* The "fencing-in" doctrine was initially applied in antitrust cases having no First Amendment implications. See *FTC* v. *National Lead Co.,* 352 U. S. 419 (1957). In recent years, however, the FTC has applied it in false and misleading advertising cases. In the words of one commentator:

> "For more than sixty years the F.T.C. has gone its way oblivious to the First Amendment. Conceived as an antitrust agency, it has drawn on antitrust principles and remedies in regulating advertising. In fashioning relief, for example, the commission has issued broad 'fencing in' orders to advertisers and price fixers alike. . . . But advertisers are now in a different situation: there is no constitutional right to fix prices, but there is a constitutional right to advertise truthfully." Elman, "The New Constitutional Right to Advertise," 64 *ABA Journal* 206, 209 (February, 1978).

B. The Writ Should Be Granted Because of the FTC's Customary Imposition of Overbroad Prior Restraints in the Form of Affirmative Disclosure Orders Under Its "Fencing-in" Doctrine.

Resolution of this issue is now critical because there is an inherent conflict between the FTC's "fencing-in" doctrine as applied to advertisers, on the one hand, and their First Amendment rights enunciated in *Virginia State Board of Pharmacy*, on the other. A former FTC commissioner predicted, "The most serious impact on the FTC of these recent First Amendment decisions will be in curbing issuance of unjustifiably broad 'fencing in' rules and orders against against advertisers. . . ." Elman, "The New Constitutional Right to Advertise," 64 *ABA Journal* 206, 208 (February, 1978). Yet the FTC has not responded to this Court's decisions by tailoring its application of the "fencing-in" doctrine to meet First Amendment requirements, but has instead continued routine application of the doctrine in advertising cases.

The FTC considers the "fencing-in" doctrine to be generally applicable to its remedial authority. It has expressly relied upon it in no fewer than 36 cases, 17 of which were decided subsequent to this Court's decision in *Virginia State Board of Pharmacy*. To date, the FTC's application of its "fencing-in" doctrine in false and misleading advertising cases decided subsequent to *Virginia State Board of Pharmacy* has spawned seven decisions in the Courts of Appeals, five of which have resulted in partial or complete reversals of overbroad orders. See *Beneficial Corp.* v. *FTC*, 542 F. 2d 611 (3d Cir. 1976), *cert. denied*, 430 U. S. 983 (1977); *Warner-Lambert Co.* v. *FTC*, 562 F. 2d 749 (D. C. Cir. 1977), *cert. denied*, 435 U. S. 950 (1978); *National Commission on Egg Nutrition* v. *FTC*, 570 F. 2d 157 (7th Cir. 1977), *cert. denied*, 439 U. S. 821 (1978); *Porter & Dietsch, Inc.* v. *FTC*, 1979-2 Trade Cas. (CCH) ¶ 62,796 (7th Cir. 1979); *Standard Oil of California* v. *FTC*, 577 F. 2d 653 (9th Cir. 1978); *Jay Norris, Inc.* v. *FTC*, 598 F. 2d 1244 (2d Cir. 1979). See also *U. S.* v. *National Society of Professional En-*

gineers, 555 F. 2d 978 (D. C. Cir. 1977), *affirmed on other grounds*, 435 U. S. 679 (1978). Moreover, the FTC's broad construction of its remedial authority has resulted in the issuance of at least 37 orders (in addition to those reviewed in the court of appeals decisions mentioned above) both before and after *Virginia State Board of Pharmacy*, in which the FTC has not only ordered that deceptive advertising practices be discontinued but also affirmatively required certain words to be uttered, often specific words chosen by the FTC and often words not necessary to prevent deception.* Indeed, an FTC staff publication entitled *Consumer Information Remedies* states (at p. 276) "Affirmative disclosure requirements form the backbone of current FTC initiatives . . ." against misleading advertising.

* *See, e.g., In re Grolier, Inc.*, 91 F. T. C. 315 (1978) (encyclopedia publisher subject to affirmative disclosure provisions identical to those imposed in this case); *In re Crowell-Collier Pub. Co.*, 75 F. T. C. 241 (1969), *aff'd, P. F. Collier & Son Corp.* v. *FTC*, 427 F. 2d 261 (6th Cir. 1970) (door-to-door sales representatives of encyclopedia publisher required to disclose sales purpose orally); *In re Mather Hearing Aid Distrib., Inc.*, 78 F. T. C. 709 (1971) (hearing aid seller required to disclose that persons responding to its advertisements may be contacted by a salesman); *In re National Housewares*, 90 F. T. C. 512, 602 (1977) (seller of household appliances, tools and books required to say, when offering a gift by mail or phone, "We would like the opportunity to sell our products to you"); *In re Horizon Corp.*, No. 9017 (F. T. C., filed Sept. 21, 1979) (Initial Decision) (land sale company required to state, in specified language, that the land is not being sold as a financial investment, that its value is uncertain, and that any attempt by the buyer to resell the land would meet competition from the original seller); *In re Amrep Corp.*, No. 9018 (F. T. C., filed July 18, 1979) (Initial Decision) (land selling enterprise required to disclose, in specified language, that value of land is uncertain, that the land was not a financial investment, and "do not count on . . . being able to resell it"); *In re Raymond Lee Org., Inc.*, 92 F. T. C. 489 (1978) (promoter of inventions required to disclose, in specified language, the actual cost of its service and the number of clients whose earnings exceeded their costs); *In re American Home Products Corp.*, No. 8918 (F. T. C., filed Sept. 1, 1978) (Initial Decision) (maker of Anacin required to state in all ads, "Anacin is not a tension reliever"); *In re Bristol-Myers Co.*, No. 8917 (F. T. C., filed Sept. 28, 1979) (Initial Decision) (manufacturer of Bufferin and Excedrin required to disclose that its products contain aspirin

(Footnote continued on next page.)

A clear rule requiring the FTC to limit application of its "fencing-in" doctrine to avoid unnecessary interference with freedom of commercial expression protected by the First Amendment has not emerged. Britannica submits that the First Amendment requires at a minimum that the government demonstrate that the remedial order is necessary to prevent deception and

(Footnote continued from preceding page.)
and to state that Bufferin and Excedrin are no faster, gentler or stronger than aspirin); *In re Travel King, Inc.*, 86 F. T. C. 715 (1975) (promoters of "psychic surgery" tours to the Philippines required to state in response to all inquiries, "Psychic surgery has been shown to be fraud and fakery . . ."); *In re Arthur Murray Studio, Inc.*, 78 F. T. C. 401 (1971), *aff'd*, 458 F. 2d 622 (5th Cir. 1972) (dance studio required to reveal sales purpose behind contests—consent order); *In re Simeon Mgt. Corp.*, 87 F. T. C. 1184 (1976), *aff'd*, 579 F. 2d 1137 (9th Cir. 1978) (weight reduction clinic required to disclose that its program included injections of a drug not approved by the FDA for treatment of obesity); *In re Kroger Co.*, No. 9102 (F. T. C., filed June 11, 1979) (Initial Decision) (grocery retailer required to state in comparative pricing advertisements, "Whether you will save or how much you will save will depend on how much you buy"); *In re Household Finance Corp.*, No. 9111 (F. T. C., filed Mar. 16, 1979) (Initial Decision) (lender required to send specified "NOTICE OF RIGHT TO CANCELLATION" to customers who reaffirm a previously discharged debt which is not disclosed as a finance charge); *In re Great Atlantic & Pacific Tea Co.*, No. 8916 (F. T. C., filed Mar. 25, 1975) (grocery retailer required to include in each advertisement containing prices of identified items the following statement, "Each of these advertised items is required to be readily available for sale at or below the advertised price in each A&P store, except as specifically noted by this ad"); *In re Peacock Buick, Inc.*, 86 F. T. C. 1532 (1975) (used car dealer required to disclose the exact amount of any handling or service charge, that credit insurance is optional, and the words, "FOR EXACT MILEAGE, SEE ODOMETER"); *In re State Credit Control Bd.*, 70 F. T. C. 1318 (1966) (collection agency required to disclose the extent and nature of its authority to act in connection with each debt); *In re Taylor-Friedsam Co.*, 69 F. T. C. 483 (1966) (seller of imported ribbon required, whenever making representations about fiber content, to affix a tag with fiber content information to the ribbon); *In re USLife Credit Corp.*, 91 F. T. C. 984 (1978), *vacated*, ... F. 2d ..... (5th Cir. 1979) (lender required to state on forms, "You are *not* required to purchase" credit insurance in connection with a loan).

Other cases involving affirmative disclosure requirements include: *In re Firestone Tire & Rubber Co.*, 81 F. T. C. 398 (1972), *aff'd*,

(Footnote continued on next page.)

that proffered alternatives are false or misleading before it can thrust its phraseology upon an unwilling speaker.

If there is constitutional doubt about the FTC's continuing program of prior restraints in the form of overbroad affirmative disclosure orders under its "fencing-in" doctrine, as there must be, the Court should grant the writ to state the appropriate rule.

II. This Court Should Grant the Writ to Resolve the Serious Conflict Between the Circuits on the Scope of Review of FTC Orders Prescribing the Content of Commercial Communication.

In *Beneficial Corp.* v. *FTC*, 542 F. 2d 611 (3d Cir. 1976), *cert. denied* 430 U. S. 983 (1977), the Third Circuit adopted a new and more exacting standard of judicial review of remedies ordered by adminstrative agencies in First Amendment commercial-speech cases and rejected for such cases the old standard of review formulated in *Jacob Siegel Co.* v. *FTC*, 327 U. S. 608

(Footnote continued from preceding page.)
481 F. 2d 246 (6th Cir. 1973), *cert. denied*, 414 U. S. 1112 (1973); *In re Thermochemical Products, Inc.*, 76 F. T. C. 107 (1969); *In re S. S. S. Co.*, 73 F. T. C. 1058 (1968), *enforced*, 416 F. 2d 226 (6th Cir. 1969); *In re General Transmissions Corp.*, 73 F. T. C. 399 (1968); *In re Western Radio Corp.*, 63 F. T. C. 882 (1963), *modified on other grounds*, 339 F. 2d 937 (7th Cir.), *cert. denied*, 381 U. S. 938 (1965); *In re Tashof*, 74 F. T. C. 1361 (1968), *aff'd*, 437 F. 2d 707 (D. C. Cir. 1970); *In re Universal Credit Acceptance Corp.*, 82 F. T. C. 570 (1973), *rev'd in part on other grounds, Heater* v. *FTC*, 503 F. 2d 321 (9th Cir. 1974); *In re Hollywood Carpets, Inc.*, 86 F. T. C. 784, 822 (1975); *In re Crown Central Petroleum Corp.*, 84 F. T. C. 1493 (1974), *modified*, 88 F. T. C. 210, 211 (1976); *In re Baldwin Bracelet Corp.*, 61 F. T. C. 1345, 1377 (1962), *aff'd*, 325 F. 2d 1012 (D. C. Cir. 1963), *cert. denied*, 377 U. S. 923 (1964); *In re Manco Watch Strap Co.*, 60 F. T. C. 495, *modified*, 61 F. T. C. 298 (1962); *In re ITT Continental Baking Co.*, 83 F. T. C. 1105, 1108 (1973), *rev'd in part*, 532 F. 2d 207, 220-21 (2d Cir. 1976); *In re Marketing Dev. Corp.*, No. 9067 (F. T. C., filed June 7, 1979).

(1946).* Recognizing that the *Beneficial* standard would significantly curb its broad exercise of remedial discretion, the FTC filed a certiorari petition asking this Court to reject the *Beneficial* formulation and re-instate the *Siegel* formulation even for First Amendment cases. This Court denied certiorari leaving the Third Circuit's decision standing. In the court below, the FTC asked the court to adopt the *Siegel* standard of review in this case. The Seventh Circuit did so, affirmed the overbroad FTC order as a result, and its decision is consequently in direct conflict with that of the Third Circuit.

In *Beneficial,* the Third Circuit reversed an FTC order prohibiting the use of the phrase "Instant Tax Refund" on the basis of appellant's First Amendment claim that the phrase could have been rendered non-deceptive by the alternate means of adding certain explanatory words. The Third Circuit stated that the FTC's "broad construction of its § 5 remedial authority cannot survive the demise of the commercial speech exception to the First Amendment." 542 F. 2d at 620. In addressing the standard of review to be applied to the FTC order, the Third Circuit held:

> "[W]e are ordinarily obliged to defer broadly to the Commission's exercise of informed discretion in framing remedial orders that bear some rational relationship to the . . . violation . . . . But we are dealing in this case with the Government regulation of a form of speech. *The first*

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* In the most frequently cited formulation, this Court stated in *Siegel* (327 U. S. at 611-13):

> "The Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices in this area of trade and commerce. . . . Judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy. . . . The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."

> *amendment requires, we believe, an examination of the Commission's action that is more searching than in other contexts.*" (Emphasis added.) 542 F. 2d at 618-19.

In addressing the substantive First Amendment standard to be applied by the FTC, the Third Circuit stated:

> "The Commission, like any governmental agency, must start from the premise that any prior restraint is suspect, and that a remedy, even for deceptive advertising can go no further than is necessary for the elimination of the deception." 542 F. 2d at 620.

Applying the strict standard of review formulated above, the Third Circuit analyzed whether the total ban on the use of the offending phrase was permissible and concluded that the advertising might be rewritten in various ways to eliminate deception while still utilizing the specified phrase. The Third Circuit held that the First Amendment required the FTC to permit use of such alternative forms of disclosure, and the court consequently remanded the case to the FTC.

The FTC filed a petition for a writ of certiorari in *Beneficial* asking this Court in its "Question Presented" to decide whether the Third Circuit "applied an erroneous standard of judicial review of remedies of administrative agencies." The FTC quoted the standard formulated in *Siegel* and argued that even in First Amendment cases courts should apply the *Siegel* "wide latitude" "reasonable relation" "abuse of discretion" standard of review. The FTC stated:

> "The restrictions that the court of appeals decision [in *Beneficial*] imposes upon the Commission's ability to frame effective remedies in such cases and the expanding role of the courts in reviewing its orders which that decision presages would seriously handicap the agency's ability properly to perform its duties in this important

aspect of its work."* FTC Petition for Certiorari at p. 17.

This Court denied the FTC's petition.

Although the FTC failed in its efforts to have *Beneficial* reversed, the FTC in this case asked the Seventh Circuit to apply the *Siegel* standard of review** and the Seventh Circuit did so. The Seventh Circuit stated the standard of judicial review of the Order as follows (p. A9):

> "Once a violation of the Act has been found our role in reviewing the remedy is a narrow one. . . .
>
> > 'The Commission . . . has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.' *Jacob Siegel Co. v. FTC.* . . ."

The Seventh Circuit upheld the disclosure requirements of the Order because they "were reasonably related to the deceptive practices found" and were not "an abuse of discretion." (pp. A10-A11) The Seventh Circuit engaged in no independent judicial analysis, as required by *Beneficial,* into whether the alternatives suggested by Britannica were adequate to achieve the objective of truthful communications. Further, it conceded that the ALJ and the FTC made "no express comparison"

* The FTC in its certiorari petition in *Beneficial* did not dispute the general First Amendment proposition, also quoted by the Seventh Circuit in its opinion in this case, that a remedy should "go no further than is necessary to prevent deception." Instead, it quoted and directly attacked the Third Circuit's refusal in a First Amendment case to "defer broadly to the Commission's exercise of informed discretion," arguing that this Court's First Amendment commercial speech decisions did not "change the scope of judicial review of Commission orders." FTC Petition for Certiorari at pp. 14-15.

** The FTC contended in the Seventh Circuit:

> "It is well settled that the Commission has wide latitude in fashioning remedies to stop the unlawful practices found to exist, and 'courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist' [citing *Siegel*]." Brief of FTC in Seventh Circuit at p. 13.

involving the alternative remedies (p. A11) and justified the FTC's failure on the ground that the issue was "only the form of disclosure to be required." (p. A12)* Through application of the *Siegel* standard of review, and rejection of the *Beneficial* standard, the Seventh Circuit let stand an order which is simply inconsistent with the First Amendment.**

The Seventh Circuit, at the express urging of the FTC, thus placed itself in square conflict with the Third Circuit's decision in *Beneficial.*

Britannica agrees with the FTC as to the importance of the standard of judicial review of FTC orders in First Amendment cases. In its petition to this Court in *Beneficial* the FTC stated:

> "The issue is important in the Commission's administration of the Federal Trade Commission Act. A major portion of the Commission's work under the Act involves the elimination and prevention of false and misleading advertising." FTC Petition for Certiorari at p. 16.

The conflict between the Third and Seventh Circuits now makes resolution of the issue by this Court critical. As discussed in Point I, *supra,* the FTC regularly elects to "remedy" deceptive practices by overly broad orders dictating the form and content of communications. Unless the conflict is resolved, those orders reviewed under the standard applied in this case by the Seventh Circuit will stand while similar orders reviewed in the Third Circuit will not.

The writ should be granted to resolve the conflict.

* It was this precise issue—the extent to which the government could constitutionally impose a certain *form* of expression upon a commercial speaker—which this court expressly left open in *Virginia State Board of Pharmacy* and which makes the *Beneficial* standard of review appropriate.

** The effect of the Seventh Circuit's decision under the *Siegel* standard is to defer to the FTC as an "expert body" the resolution of the serious First Amendment issues presented by the Order. But the FTC has no "expertise" in evaluating First Amendment claims, any more than a movie censorship board has "expertise" to evaluate the First Amendment claims of movie patrons.

III. The Writ Should Be Granted Because the Judgment Below Conflicts with the First Amendment Principles Enunciated by This Court Which Are Applicable to a Prior Restraint on the Communications of a Publisher Engaged in the Distribution of Its Publications.

The judgment below affirms a government-imposed prior restraint which—even if it were constitutional as applied to a seller of toothpaste, mouthwash, or other such products—is in direct conflict with the decisions of this Court according full First Amendment protection to a publisher engaged in the distribution of its publications.

It is axiomatic that the right to distribute is part of the First Amendment freedom of speech and of the press. See *Smith* v. *California,* 361 U. S. 147 (1959) (subjecting government regulation of booksellers to First Amendment scrutiny).* In *Griswold* v. *Connecticut,* 381 U. S. 479, 482 (1965), this Court stated:

> "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute. . . ."

Britannica does not contend that the FTC lacks the power to enjoin speech relating to the distribution of books that is actually

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* In *Smith* v. *California, supra,* the Court said (361 U. S. at 150):

> "[T]he free publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms. It is of course no matter that the dissemination takes place under commercial auspices."

See also, Emerson, *The System of Freedom of Expression* at pp. 416-17 (1970); Note, 44 *Univ. Chi. L. Rev.* 205, 235-36 (1976): "Advertisements for . . . protected written works should be fully protected as an incident to the first amendment value of the underlying speech or activity. . . . To treat such activity as commercial speech would inhibit the rights of publishers and authors to distribute their works. . . ."

false or deceptive. But in this case the FTC and the Seventh Circuit have gone far beyond a prohibition on fraud and have established an unprecedented requirement that a publisher undertake to utter specified words put in its mouth by a government agency—a requirement of a type never sustained by this Court.* It is as if the FTC, having determined that the slogan contained in the upper left-hand corner of the first page of every *New York Times,* "All the News That's Fit to Print," is false and misleading, then ordered not only the deletion of this misrepresentation but that the paper carry in its stead in inordinately bold type:

> "WARNING: Some of the news contained herein is not fit to print and some of the news that is fit to print is omitted herefrom."

Further, the Order not only imposes a requirement that Britannica make statements affirmatively prescribed in rigid detail by a government agency, but it constitutes a prior restraint on *all* communication, including entirely truthful communications, not complying with such specifications.

This Court has repeatedly stated that any prior restraint of expression comes to the Court bearing "a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 70 (1963). See also, *e.g., Near* v. *Minnesota,* 283 U. S. 697 (1931); *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415, 419 (1971) (the government "carries a heavy burden of showing justification for the imposition of a such a restraint"). And this Court has repeatedly made clear that any restriction on First Amendment freedoms "must be no greater than is necessary or essential to the pro-

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* The decisions of this Court have stood four-square for the proposition that government has no authority to compel a speaker to utter words formulated by it for pronouncement by the speaker. See, *e.g., Wooley* v. *Maynard,* 430 U. S. 705 (1977); *Miami Herald Pub. Co.* v. *Tornillo,* 418 U. S. 241 (1974); *Engel* v. *Vitale,* 370 U. S. 421 (1962); *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943).

tection of the particular governmental interest involved." *Procunier* v. *Martinez,* 416 U. S. 396, 413 (1974). See also, *e.g., Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960); *Gooding* v. *Wilson,* 405 U. S. 518, 521-22 (1972). Here the ALJ, in direct contradiction of these established constitutional principles, stated in sustaining the severe restraints contained in the Order: "All doubts as to remedy are to be resolved in [the government's] favor." (p. A158) The Seventh Circuit majority upheld the specifications because it "was not persuaded that a [sic] remedy ordered by the Commission is not the least restrictive alternative." (p. A15) The court thus reversed the applicable presumption, placing the burden on Britannica to demonstrate that the Order was *not* the least restrictive alternative rather than requiring the government to meet the "heavy burden" placed upon it by this Court's decisions. The Seventh Circuit upheld the Order without explaining, or requiring the FTC to explain, why the less restrictive forms of remedy suggested by Britannica were in any way inadequate to achieve the objective of completely truthful communication.

The Seventh Circuit simply misconstrued in a fundamental way the constitutional principles applicable to this case, ignoring altogether the fact that the Order is a direct restraint on the communications of a publisher engaged in the distribution of its publications and, therefore, entitled to the fullest degree of First Amendment protection.* This Court should grant certiorari to prevent the clear violation of Britannica's First Amendment rights represented by the judgment below.

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* As Britannica argued in the court below, if the sellers of erotic literature are entitled to constitutional protection against over-broad restraints, then surely Britannica, the publisher of the nation's finest reference work (esteemed by educators and employed by Americans in all walks of life to enhance their education) is entitled to the same protection. Brief for Britannica in the Seventh Circuit at p. 45. Despite Britannica's strenuous urging, however, there is not one word in the Seventh Circuit opinion to indicate a recognition that this case involves a direct restraint on the dissemination of publications fully protected by the First Amendment.

IV. The Writ Should Be Granted to Decide the Important Issue of the FTC's Statutory Authority to Prescribe Conduct Which Unnecessarily Threatens the Continued Viability of an Established Method of Doing Business.

The FTC has overstepped the bounds of its statutory authority in imposing its affirmative disclosure requirements upon Britannica. By specifying what Britannica must say and minutely defining how and when Britannica must say it, the Order renders almost unusable Britannica's principal method of conducting its business. As the ALJ, the FTC, and the reviewing court expressly recognized, Britannica relies upon in-home presentations as its principal method of marketing its encyclopedia and other publications. (pp. A2, A26, A61) Consequently, the Order, which dictates the content and format of Britannica's initial contacts with prospective customers, strikes at the very heart of Britannica's sales efforts.

In reviewing FTC orders prohibiting the use of trade names, this Court has held that the FTC's remedial power is limited when it issues orders which would destroy valuable business assets. In *FTC* v. *Royal Milling Co.,* 288 U. S. 212 (1933), this Court reversed an FTC order barring the use of certain trade names. This Court said that the trade names "constitute valuable business assets . . . the destruction of which probably would be highly injurious and should not be ordered if less drastic means will accomplish the same result." 288 U. S. at 217. Similarly, in *Jacob Siegel Co.* v. *FTC,* 327 U. S. 608, 611 (1946), the Court, while acknowledging that the FTC generally "has wide discretion in its choice of a remedy," reversed an order barring the use of a trade name on the ground that the FTC had failed to consider whether qualifying language, as opposed to a complete bar, would be sufficient to eliminate the deception.

The *Royal Milling* and *Siegel* decisions, requiring a clear demonstration by the FTC that less drastic alternatives are

unavailable, apply by direct analogy to the present case in which the FTC's order threatens to deprive Britannica of its ability to pursue its principal method of distributing its products. This established and well-developed marketing technique is a business asset at least as important and valuable to Britannica as the trade names at issue in *Royal Milling* and *Siegel*. At a minimum, Britannica submits that the purely remedial power vested in the FTC under the Act* does not justify the destruction of a long-established mode of doing business without an explicit consideration by the FTC of alternative remedies and a demonstration of why such alternatives are inadequate to accomplish the objective.

Nothing in the language or legislative history of the Federal Trade Commission Act indicates any Congressional intent to vest in the FTC authority to go beyond the prohibition of deceptive practices and impose its own views of "desirable" business conduct. When the Federal Trade Commission Act was amended to include "deceptive acts or practices," a Federal Trade Commissioner stated in the course of the hearings:

> "Now another thing I wish you to remember is this: The Federal Trade Commission cannot impose any penalties whatever. The authority of the Federal Trade Commission is wholly preventive or injunctive. All that the Federal Trade Commission can do or undertake to do, if it finds that someone is violating the law over which it has jurisdiction, is to say, 'Stop.' 'Stop that practice.' 'Cease and desist from that practice.' That is all it can do." Comments of FTC Commissioner Edwin L. Davis, Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on Senate Bill 3744 in the 74th Congress (1937).

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* In *FTC* v. *Eastman Kodak Co.*, 274 U. S. 619, 623 (1927), this Court stated:

> "The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. . . . It has not been delegated the authority of a court of equity."

Members of Congress have continued to insist that the Act is not intended to vest in the FTC broad authority to prescribe the manner of conduct for business enterprises. On October 5, 1979, two members of the FTC appearing at oversight hearings before the Consumer Subcommittee of the U. S. Senate Committee on Commerce, Science and Transportation, were questioned by the Chairman of the Committee with specific reference to the 3-by-5 warning card and the other affirmative requirements of the Order in this case:

> Chairman: Well, I completely understand your cease and desist type of things, but where you require a company to affirmatively do a precise and specific thing that you do not require a competitor to do affirmatively, then it seems to me if you are taking that position you are wrong. *That is not my intent as a member of Congress. And if the courts say that in interpreting the law that you have properly applied your authority, then we need to take some of the authority away.* (Emphasis added.)

The statutory principles dictate that a remedy must be, in fact, a remedy and not a gratuitous or punitive destruction of established property interests. In failing to limit the FTC's action to what is necessary to achieve the remedial objective of avoiding deception, the judgment below raises a serious issue as to the limits of the FTC's statutory authority which requires review by this Court.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-697

ENCYCLOPAEDIA BRITANNICA, INC. AND BRITANNICA HOME LIBRARY SERVICES, INC.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

APPENDIX.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

APPENDIX.

TABLE OF CONTENTS.

PAGE

Decision of the United States Court of Appeals for the Seventh Circuit entered August 2, 1979 ..... A1

Federal Trade Commission Proceedings

Opinion of the Commission A26

Final Order A37

Initial Decision by Administrative Law Judge A52

Federal Trade Commission Act, 15 U. S. C. § 45 ..... A184

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 76-1477

ENCYCLOPAEDIA BRITANNICA, INC., and BRITANNICA HOME LIBRARY SERVICES, INC.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition to Review a Final Order of the
Federal Trade Commission

ARGUED FEBRUARY 17, 1977—DECIDED AUGUST 2, 1979

Before FAIRCHILD, *Chief Judge*, and SPRECHER and WOOD, *Circuit Judges.*

FAIRCHILD, *Chief Judge*. This is a petition to review an order of the Federal Trade Commission holding that certain practices of petitioners, Encyclopaedia Britannica, Inc. and its subsidiary, Britannica Home Library Services, Inc. (hereinafter referred to jointly as Britannica) violated § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45(a)(1)[1], and ordering Britannica

1. At the time this proceeding was instituted, 15 U. S. C. § 45(a)(1) provided: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." This section has since been amended in ways not relevant to this appeal.

to cease and desist from certain practices. Some of the cease and desist provisions of the orders were so framed as to forbid certain customary sales and promotional activity unless specified notices were given. These notice provisions are the subject of this review.

I. THE AGENCY PROCEEDING

Encyclopaedia Britannica, Inc. is a New York Corporation with its principal place of business in Chicago. As is widely known, Britannica publishes, sells, and distributes encyclopedias, textbooks, general reference works, and other educational and literary products throughout the world. The primary sales method is direct selling at the homes of customers.

The complaint which initiated the proceeding before the Commission was issued December 11, 1972. It charged deceptive practices in recruitment of sales representatives, in sales presentations to members of the public in obtaining leads to persons who will allow Britannica sales representatives into their homes, in seeking subscriptions to book promotions, and in collection procedures. On December 16, 1974, after trial hearings, ALJ Barnes entered very extensive findings, conclusions, and a remedial order. In respects not material on this review, the ALJ found deceptive and unfair practices in recruiting advertisements, in certain sales devices, a mail order program, and the use of types of collection letters. On this review, Britannica has narrowed its challenges to remedial provisions relating to deception on initial contact of salesmen with consumers, and to deception in certain advertised offerings.

A. The ALJ summarized his detailed findings concerning "Initial Contact With Consumers," in part as follows:

> "The primary means by which EB [Britannica] sells its products and services is through the door-to-door solicitation of consumers. . . . EB's salesmen utilize numerous devices which disguise the purpose of the salesman's initial contact with prospects—devices which essentially are ruses for gaining admission into prospects' homes 'not in the role of a salesman' . . . . These devices are approved by EB's management, are made available to its salesmen, and the salesmen are trained by EB to effectively use such devices.—
>
> "One ploy used to gain entrance into prospects' homes is the Advertising Research Analysis questionnaire. This form questionnaire is designed to enable the salesman to disguise his role as a salesman and appear as a surveyor engaged in advertising research. EB fortifies the deception created by the questionnaire with a form letter from its Director of Advertising—for use with those prospects who may question the survey role. These questionnaires are thrown away by salesmen without being analyzed for any purpose whatsoever.—
>
> "Thus, the record is clear that EB's sales representatives misrepresented and failed to disclose the purpose of the initial contact with prospects. These practices were authorized and condoned by EB. . . ."

The portions of the ALJ's order challenged by Britannica and remedying the practices above described require Britannica to cease and desist from:

> "D. Visiting the home or place of business of any persons for the purpose of soliciting the sale, rental or lease of any publications, merchandise or service, unless at the time admission is sought into the home or place of business of such person, a card 3 inches by 5 inches in dimension, with all words in 10-point bold-face type, with the following information, and none other, in the indicated order, is presented to such person:
>
> (1) the name of the corporation;
>
> (2) the name of the salesperson;
>
> (3) the term "Encyclopedia Sales Representative" [or other applicable product];
>
> (4) the terminology: "The purpose of this representative's call is to solicit the sale of encyclopedias [or other applicable product]; and

(5) the statement: This card should be kept as part of your permanent records of this transaction.

[Paragraph 5 was deleted from the order by the Commission.]

"E. Failing to give the card, required by Paragraph II D, above, to each such person, to direct each such person to read the information contained on such card, and to provide each such person with an adequate opportunity to read the card before engaging any such person in any sales solicitation.

In discussing the remedial order, the ALJ said he had "taken into consideration . . . (1) the numerous violations of law by respondents which this record establishes, consisting of conduct which has been declared unlawful by the Commission over the years, (2) the fact that this order must be designed to protect the general consuming public which includes the ignorant, the unthinking and the credulous . . ., (3) respondents' past record of unlawful conduct as determined in previous Commission proceedings, [1952 and 1961 orders concerning representations with respect to allegedly 'special' prices and the like] and (4) the fact that '. . . once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor' . . . ."

With respect to the Initial Contact deception, the ALJ wrote as follows:

"The Order contains provisions which prohibit respondent from misrepresenting the purpose of contacting persons in their homes or places of business, and require respondent to clearly inform prospects in telephone talks and at the door that the purpose of the visit is to solicit the sale of respondent's products or services. This will correct respondent's misrepresentations and deceptions as shown by the record. As one of EB's former corporate officials testified, the ability to gain admittance into the home is essential to respondent's business operations (Balsano, Tr. 1542). Thus, elimination of misrepresentations and deceptions in gaining admittance into homes is crucial to this Order as well. There is no conceivable business or other justification

for misrepresenting the purpose of a salesman's visit. A homeowner is entitled to know the purpose behind any visit by a salesman. The time has arrived to put an end to deceptions of this type.

"For these reasons, the Order entered herewith requires EB's salesmen to present the prospect with a card which clearly discloses the purpose of the visit. Respondent strenuously objects to such an Order provision (RPF III-7; RM, p. 43; RRM, p. 17); however, no satisfactory alternatives are suggested. The use of a disclosure card should prove effective to eliminate misrepresentations and deceptions in obtaining appointments with homeowners, or in gaining admittance into homes. If this provision proves unduly onerous, relief from this provision can be requested at a later date.

"The Order also requires respondent's salesmen to give the prospect an opportunity to read the card at the door before any sales presentation can commence. This seems ample disclosure of the purpose of the salesman's visit. Thus, complaint counsel's proposal for different size cards depending upon the method of intital contact with a prospect seems superfluous and is rejected."

The requirement of the Card-at-the-Door was debated in the briefs of counsel on appeal to the Commission. Britannica pointed to testimony that the required presentation of the card would have a devastating effect upon a rational interchange between salesman and prospect. Britannica proposed as less drastic alternatives (1) the requirement of oral disclosure and of training of sales personnel to make such disclosures, and (2) the requirement that the sales representative present an ordinary business card, disclosing his title as "Sales Representative."

Commission counsel argued several aspects of the greater effectiveness of the prescribed card, as compared with an ordinary business card, in giving persons clear notice of the caller's sales purpose and an opportunity to protect themselves from unwanted harassment.

The opinion of the Commission dealt specifically with Britannica's concern over the Card-at-the-Door requirement. Adverting in detail to evidence that Britannica's sales representatives have been trained to conceal the sales purpose of seeking admission to a home, the Commission concluded that "[t]he company-described disguise techniques necessitate inclusion of an order provision requiring clear and conspicuous disclosure of the fact that the representative is a salesman and of the true purpose of gaining entry into the home."

The Commission concluded that the prescribed advice to the customer to keep the card did "not appear to be necessary in order to provide a clear and conspicuous disclosure of the nature and purpose of the call" and omitted that prescription.

B. The ALJ summarized his detailed findings concerning "Lead-Getting Activities," in part, as follows:

> "EB's magazine and direct-mail advertisements as well as contest entry cards, used to obtain the names of persons who will be contacted by EB's salespersons for the purpose of persuading such persons to purchase EB's products, do not disclose the fact that persons who respond will be contacted by EB's salespersons.—
>
> ". . . Respondent also points out that EB's salesmen usually telephone prospects prior to visiting them personally. These fact differences do not change the basic deception inherent in EB's methods. EB's magazine advertisements affirmatively mislead the public into believing that all materials and information will come by mail—direct from the publisher. . . . Some of the contest entry cards indicate EB is giving away prizes in celebration of its 200th anniversary, that there is no obligation in filling out a card.—
>
> "The *sole* purpose of these activities is to obtain leads to prospects. The only way to protect the public, to correct the misrepresentations in respondent's lead-getting activities, is to inform the public of the true motives behind respondent's offers of free information and prizes—that respondent has a profit motive and will seek to sell its products to those who respond to its devices. These are

> material facts the public should know. Disclosure that a salesman may call to make a sales presentation of respondent's products and services will correct respondent's misrepresentations and make these material facts available to the public."

The portions of the ALJ's order challenged by Britannica and remedying the practices above described require Britannica to cease and desist from:

> "A. Disseminating or causing to be disseminated any advertisement or promotional material which solicits participation in any contest, drawing or sweepstakes, or solicits any response to any offer of merchandise, service or information unless any such solicitation clearly and conspicuously discloses the following statement in 10-point bold-face type:
>
> *NOTICE TO CONSUMER*—PERSONS WHO REPLY AS REQUESTED MAY BE CONTACTED BY A SALESPERSON FOR THE PURPOSE OF SELLING [insert name of applicable product].
>
> "B. Providing any return card, coupon or other device which is used to respond to any advertisement or promotional material covered by Paragraph II A above, unless the following statement clearly and conspicuously appears in 10-point bold-face type in immediate proximity to the space provided for a signature or other identification of the responding party:
>
> *NOTICE TO CONSUMER*—PERSONS WHO RETURN THIS [insert name of applicable device] MAY BE CONTACTED BY A SALESPERSON FOR THE PURPOSE OF SELLING [insert name of applicable product].

In discussing these portions of the remedial order, the ALJ wrote as follows:

> "EB is prohibited by the Order from disseminating any promotional material or providing any contest entry card which does not clearly disclose that any person responding to such materials may be contacted by a salesperson. This provision does not require that a salesperson call, but

merely informs the public of respondent's intent in disseminating such materials and the risks or obligations which may be involved. This is information the public should have, and it does not unduly interfere with any of respondent's business operations."

On appeal to the Commission, Britannica argued that the disclosure is unnecessary and in any event is not the least drastic alternative. Britannica took issue with the choice of words, and suggested that at most there might be a requirement that Britannica disclose in clear print that the responding individual may be contacted to see if he would desire further information on the particular product.

In response, Commission counsel emphasized the support in the record for the fact that a substantial number of consumers do not want visits from encylopedia salespersons, and that by failing to disclose that those who respond are subject to an unannounced visit by a salesperson, Britannica obtains a greater number of responses.

The opinion of the Commission treated specifically the portion of the order requiring these disclosures in advertising or promotional material which solicits participation in contests and the like, or solicits a response to an offer of merchandise, service, or information. It said:

> "The Commission has determined that these order provisions are needed to inform the consumer that the card or coupon response will trigger the delivery of material and information by a sales representative whose call is for the purpose of selling. Such knowledge cannot be gleaned by the consumer who reads the ads or who enters the contest. The ads mislead the consumer in that the wording portrays all information as coming by mail and direct from the publisher. A number of contest entry cards portray the give-away merely as a celebration of the company's bicentennial and suggest that a consumer who fills in the card will not be imposed upon. We reject respondent's contention that disclosure is unnecessary and that the language of the disclosure is 'negative.' "

The Commission's order was issued March 9, 1976.

Britannica does not challenge the sufficiency of the evidence to support the findings of violation, nor does it challenge the propriety of a remedial order. Rather, Britannica focuses its attack on the provisions requiring specified disclosures on initial contact with prospective customers and in certain types of lead-getting material. Britannica argues that these remedial provisions should be set aside because: (1) the disclosures ordered by the Commission are not the least restrictive alternative for curing deception; (2) the Commission failed to state reasons for its choice of remedy in violation of the Administrative Procedure Act, 5 U. S. C. § 557(c); (3) the Commission's order unconstitutionally infringes on Britannica's First Amendment right to advertise and solicit sales; (4) the Commission abused its discretion in its method of enforcement; and (5) Britannica did not have an opportunity to rebut information it believes the Commission considered in selecting the remedy. We will now consider each of these contentions, respectively.

II. WHETHER THE COMMISSION EXCEEDED ITS STATUTORY AUTHORITY IN REQUIRING THE AFFIRMATIVE DISCLOSURES IN THIS CASE

Once a violation of the Act has been found, our role in reviewing the remedy is a narrow one. As the Supreme Court has stated:

> The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

Jacob Siegel Co. v. *FTC*, 327 U. S. 608, 612-13 (1946). *See also, e.g., Gilbertville Trucking Co.* v. *U. S.*, 371 U. S. 115, 130 (1962); *L. G. Balfour Co.* v. *FTC*, 442 F. 2d 1, 23 (7th

Cir. 1971).[2] If an FTC order bears no reasonable relationship to the unlawful conduct, however, courts may narrow the scope of the order accordingly. *E.g., Chrysler Corp.* v. *FTC,* 561 F. 2d 357, 364 (D. C. Cir. 1977); *ITT Continental Baking Co.* v. *FTC,* 532 F. 2d 207, 220-21 (9th Cir. 1976). Similarly, courts may modify FTC orders if a less onerous remedy would have the same effect in furthering the governmental interest of preventing deception as the remedy chosen. *FTC* v. *Royal Milling Co.,* 288 U. S. 212 (1933). *Cf., Beneficial Corp.* v. *FTC,* 542 F. 2d 611 (3d Cir. 1976), *cert. denied* 97 S. Ct. 1679 (1977). However, the Commission in framing its remedy is "not limited to prohibiting the precise misrepresentations that had occurred in the past." *National Com'n. on Egg Nutrition* v. *FTC,* 570 F. 2d 157, 163-64. As the Supreme Court has stated:

> We think it reasonable for the Commission to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in future advertisements. As we said in *Federal Trade Comm'n* v. *Ruberoid Co.,* 343 U. S. 470, 473: '[T]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past.' Having been caught violating the Act, respondents 'must expect some fencing in.' *Federal Trade Comm'n* v. *National Lead Co.,* 352 U. S. 419, 431.

FTC v. *Colgate-Palmolive Co.,* 380 U.S. 374, 395 (1965). *Cf. National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 698 (1978).

We have no hesitancy in concluding that the requirement of the disclosures on initial contact and in the so-called promotional materials were reasonably related to the deceptive practices found. We do not think Britannica seriously contends that required disclosure in some form is an improper remedy, and the choice the Commission made as to form and content of the

2. It is well established that the Commission is authorized to require affirmative action as a remedy in addition to a cease and desist order. *E.g., Warner Lambert Co.* v. *FTC,* 562 F. 2d 749, 756 (D. C. Cir. 1977); *Waltham Watch Co.* v. *FTC,* 318 F. 2d 28 (7th Cir.), *cert. denied* 375 U. S. 944 (1963).

disclosures could not be deemed an abuse of discretion. These choices were well within the range.

III. WHETHER THE COMMISSION ADEQUATELY ARTICULATED THE REASONS FOR ITS CHOICE OF PRESCRIBED FORMS OF DISCLOSURE

Britannica contends that the remedial provisions under attack must be set aside because the Commission failed to state reasons for its discretionary choice of forms of disclosure. Britannica points to the requirement of 5 U.S.C. § 557(c) (Administrative Procedure Act), that "All decisions . . . shall include a statement of . . . findings and conclusions, and the reasons or basis therefor, on all the material issues of . . . discretion presented on the record . . . ." *See also, Burlington Truck Lines* v. *U.S.,* 371 U.S. 156 (1942), faulting the ICC for failure to make findings and an analysis to justify its choice between two different available and apparently adequate remedies.

We have set out or summarized the findings, conclusions, and comments of the ALJ and Commission concerning the deceptive practices at which these remedies are directed. There is emphasis on the studied character of the deceptions. We think these clearly set forth adequate reasons for requiring affirmative disclosure of the sales purposes involved rather than a simple command to cease the deception. Britannica suggested to the ALJ and the Commission less onerous forms of disclosure, *i.e.,* oral rather than written (except for an ordinary business card) in the initial contact and less blunt reference to the sales purpose of the contact to be expected by a person answering a promotional ad.

It is true that the ALJ and Commission made no express comparison between the suggested less onerous forms of disclosure and the form adopted. With respect to the initial contact, the ALJ wrote that the card as ordered "should prove effective" and "no satisfactory alternatives are suggested." The Commis-

sion asserted the need for "clear and conspicuous disclosure" and indicated its consideration of that standard in deciding to omit the portion of the card suggesting that the recipient keep it. We think there is the clearest implication from these remarks in the context of the record that the alternatives had been considered and been found not to be adequately effective.

With respect to the required disclosure in lead-getting activities, the ALJ wrote "This is information the public should have, and it does not unduly interfere with any of respondent's business operations." The Commission asserted that the provisions "are needed," and rejected Britannica's contention that the language is "negative." Again its seems clear to us that the suggested alternative had been considered and found not to be adequately effective.

Burlington is readily distinguishable. There the available remedies were quite different, and the Court found every indication that the remedy not chosen would have been effective. In the present case, the matters at issue are only the form of the disclosure to be required, and it seems clear, though not expressly stated, that the Commission considered the less onerous forms suggested and decided they would not be adequately effective. We do not consider that the Administrative Procedure Act, nor *Burlington* requires us to set aside the challenged provisions because the Commission did not expressly make the comparison.

IV. WHETHER THE ORDER OF THE COMMISSION INFRINGES ON BRITANNICA'S CONSTITUTIONAL RIGHT TO ADVERTISE AND SOLICIT SALES

The proposition that commercial speech enjoys some degree of First Amendment protection can no longer be seriously questioned. *See, e.g., Bates* v. *State Bar of Arizona,* 433 U. S. 350 (1977); *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S. 748 (1976); *National Com'n. on Egg Nutrition,*

supra. It is also beyond question, however, that deceptive advertising is subject to regulation. As the Supreme Court stated in *Bates* v. *State Bar of Arizona, supra,* 433 U. S. at 383:

> Advertising that is false, deceptive, or misleading of course is subject to restraint. See *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. at 771-772, and n. 24, 96 S.Ct., at 1830-1831. Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech. *Id.,* at n. 24, 96 S.Ct. at 1830. And any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.

While Britannica does not dispute the general proposition that deceptive advertising can be regulated, it does argue that the affirmative disclosures required by the Commission in this case go beyond the constitutionally permissible.

A remedy for deceptive advertising which is broader than is necessary to prevent future deception or correct past deception is impermissible under the First Amendment. *E.g., National Com'n. on Egg Nutrition, supra,* 570 F. 2d at 164; *Beneficial Corp.* v. *FTC, supra,* 542 F. 2d at 619. In *National Com'n. on Egg Nutrition, supra,* the FTC ordered a trade association to cease and desist from disseminating advertisements containing statements to the effect that there is no scientific evidence that eating eggs increases the risk of heart disease. The FTC also ordered the trade association to include in any future advertisements or public statements it made regarding the relationship between eating eggs and heart disease the affirmative statement that many medical experts believe eating eggs may increase the risk of heart disease. This court modified this aspect of the order as overbroad under the First Amendment:

> The First Amendment does not permit a remedy broader than that which is necessary to prevent deception . . . . The . . . [additional statement] in its present form would require NCEN [the trade association] to argue the other side of the controversy, thus interfering unnecessarily with the effective presentation of the pro-egg position. The desired preventive effect can be achieved by requiring the disclosure that there is a controversy among the experts and NCEN is presenting its side of that controversy. The additional statement in the form now ordered by the FTC should be required only when NCEN chooses to make a representation as to the state of the available evidence or information concerning the controversy. As thus modified, the challenged condition would not unnecessarily curtail NCEN's right to present its position. 570 F.2d at 164.

Similarly, in *U. S.* v. *National Soc. of Professional Engineers,* 555 F. 2d 978 (D. C. Cir. 1977), *aff'd* 435 U. S. 679 (1978), the court held that an engineering society violated § 1 of the Sherman Act by adopting and enforcing a rule against competitive fee bidding. The Court of Appeals, however, also held (in a ruling not reviewed by the Supreme Court) that a requirement that the Society state affirmatively that it does not consider competitive bidding to be unethical was contrary to the First Amendment:

> In view of the foregoing, we affirm the district court's decree, except in one respect in which we think the decree is overbroad: It not only enjoins the Society from adopting any policy statement which describes price competition as 'unethical,' but also orders the Society to state affirmatively that it does not consider competitive bidding to be unethical. To force an association of individuals to express as its own opinion judicially dictated ideas is to encroach on that sphere of free thought and expression protected by the First Amendment. 555 F.2d at 984.

Finally, in *Beneficial Corp.* v. *FTC, supra,* the Third Circuit modified a Commission order which required excision of a short copyrighted and heavily promoted phrase from its advertising

material when revision of the context within which the phrase was used could eliminate deception.

In the present case, however, the Commission order does not require Britannica to argue a side of a controversy to which it is opposed as in *Egg Nutrition* or *National Soc. of Professional Engineers,* nor does it require Britannica to delete a copyright phrase as in *Beneficial Corp.* Rather, the order of the Commission directs truthful disclosure of Britannica's purposes. Both the public and consumers have a strong interest "that the stream of commercial information flow cleanly as well as freely." *Virginia State Board, supra,* at 772. "Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability." *Bates, supra,* 433 U. S. at 383. Moreover, in light of the Commission's finding that clear and conspicuous disclosure is required to prevent future deception by Britannica, we are not persuaded that a remedy ordered by the Commission is not the least restrictive alternative which will adequately further the legitimate governmental interest of the prevention of deception.

V. THE COMMISSION'S METHOD OF ENFORCEMENT AGAINST BRITANNICA

The Commission has wide discretion in selecting its methods of remedying deceptive and unfair practices. *E.g., NLRB* v. *Bell Aerospace Co.,* 416 U. S. 267, 290-95 (1974); *FTC* v. *Universal-Rundle Corp.,* 387 U. S. 244, 251-52 (1967); *Moog Industries* v. *FTC,* 355 U. S. 411, 413 (1958); *SEC* v. *Chenery Corp.,* 332 U. S. 194, 202-03 (1947). This discretion extends to the decision whether to proceed by rulemaking or adjudication. *E.g., Bell Aerospace Co., supra,* at 294 *SEC* v. *Chenery Corp., supra,* at 203.

Despite the Commission's discretionary power to proceed by adjudication, Britannica argues that the Commission has no

power to enter radically different orders against direct competitors.[3]

The Commission has the power to act against one firm practicing an industry-wide illegal practice. *E.g., FTC* v. *Universal-Rundle Corp., supra,* 387 U. S. at 251; *L. G. Balfour Co.* v. *FTC,* 442 F. 2d 1, 24 (1971); *Rabiner & Jontow, Inc.* v. *FTC,* 386 F. 2d 667, 669 (2d Cir. 1967); *Johson Products Co.* v. *FTC,* 549 F. 2d 35, 41 (7th Cir. 1977). The Commission must be accorded wide latitude in its enforcement strategy for "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *Moog Industries, Inc.* v. *FTC,* 355 U. S. 411, 413 (1958).

Nevertheless, the discretion of the Commission is not unlimited and may be "overturned . . . [for] a patent abuse of discretion." *Moog Industries, supra,* at 414; *Johnson Products Co., supra,* 549 F. 2d at 41. If the Commission elects to litigate against similarly situated competitors, for example, it cannot place one competitor at a competitive disadvantage by arbitrarily treating one violator differently from another, *Garrett* v. *F. C. C.,* 513 F. 2d 1056, 1060 (D. C. Cir. 1975). As this court has stated:

> [T]he Commission's orders are to serve a remedial and not a punitive function, . . . and the Commission may not issue orders which would arbitrarily destroy one of many violators in the market. . . . It is the responsibility of the Commission to perform a 'reasonable evaluation' of the

3. Britannica also contends that the Commission violated 5 U. S. C. § 555(e) of the Administrative Procedure Act by denying its petition for rulemaking without analysis or reasons. Whatever the merit of this argument, however, it has no bearing on the validity of the Commission's order after an adjudicative proceeding in this case. Rule making proceedings and adjudicative proceedings are not necessarily mutually exclusive. *See Lehigh Portland Cement Co.* v. *FTC,* 291 F. Supp. 628 (E. D. Va. 1968), *aff'd* 416 F. 2d 971 (4th Cir. 1969).

> competitive situation to ascertain whether a particular order would be contrary to the purpose of the laws sought to be enforced.

L. G. Balfour Co., supra, 442 F. 2d at 24 (citations omitted).

The facts of this case, however, do not support Britannica's claim of discriminatory treatment. It is true, as Britannica points out, that an earlier order against a minor competitor required only oral disclosure. *P. F. Collier & Son Corp.* v. *FTC,* 427 F. 2d 261, 265-66, footnote 6 (6th Cir. 1970), *cert. denied* 400 U. S. 926 (1970). Use of a less exacting remedy in a case litigated almost a decade prior to the present controversy does not, however, establish discriminatory enforcement. To establish such a claim, a competitor would have to show not only that competitors were treated differently, but that no rational reason exists to support the differential treatment. Differences in remedy may be attributable to any number of reasons including a realization that earlier remedies were ineffective. A prior insufficient order does not necessitate the insufficiency of all later orders. *P. F. Collier, supra,* 427 F. 2d at 276.

Recent action by the Commission further demonstrates that Britannica has not been put at a competitive disadvantage as a result of discriminatory enforcement. In a proceeding against Grolier, a principal competitor of Britannica, the Commission imposed a remedy virtually indentical to the disputed provisions in this case after a finding that Grolier has been engaging in the same practices as Britannica. *In the Matter of Grolier, Inc.,* FTC Docket No. 8879. The record, therefore does not support a claim of discriminatory enforcement by the Commission.

VI. THE APG ISSUE

Britannica points to a memorandum entitled "Analytical Program Guide for the Direct Selling Industry" (APG) and related documents, which Britannica has attempted to examine, but which have only partially been disclosed. Britannica suggests that

the APG may contain "misinformation and undisclosed evidence" which Britannica has not had an opportunity to rebut. Britannica further suggests that the "previously undisclosed evidence [is] of great relevance to the question of remedy in this case."

Britannica first learned of the existence of the APG in May, 1975, and made several motions before the Commission seeking an opportunity to examine and rebut the APG materials before decision by the Commission. The motions were denied. In denying the last, a motion to reopen the record for this purpose (March 2, 1976) the Commission referred to Britannica's contention "that the Commission has utilized the documents in the decision-making process in this adjudicative matter" and asserted

> "This motion is plainly without merit. The Commission has based its determinations and order in this matter solely upon the record compiled in Docket No. 8908."

In May, 1975 Britannica also began an action in the Northern District of Illinois seeking an injunction against the completion of the proceeding now before us (Docket No. 8908) and also seeking the right to inspect and copy the APG materials under FOIA. The requested injunction was denied, an appeal taken, and this court denied an injunction pending appeal. *Encyclopaedia Britannica, Inc.* v. *FTC,* 571 F. 2d 1013 (7th Cir. 1975). That appeal was dismissed on Britannica's motion June 30, 1975. The action for FOIA relief, proceeded until judgment was entered in favor of FTC March 20, 1979. Britannica has appealed (No. 79-1522).

We are not, of course, deciding Appeal No. 79-1522, although we take judicial notice of the record therein. We have denied a recent motion by Britannica to stay consideration herein until decision of Appeal No. 79-1522. The issues pertaining to Britannica's claim of right to disclosure of additional APG materials under FOIA may well be different from the question whether Britannica has shown that the APG materials so influenced the Commission order here under review that the matter must be remanded to the Commission to reopen the record, disclose the APG materials, and give Britannica an opportunity to rebut them insofar as they might appear to be relevant.

The APG itself is a memorandum dated July 28, 1972, apparently after the staff had recommended to the Commission that a complaint be filed against Britannica, and had submitted a proposed remedial order to be served with the complaint. The author of the APG was a staff attorney, Division of Evaluation, and the Assistant to the Director, Bureau of Consumer Protection. The APG was addresed to Mr. Pitofsky, the Director, and is endorsed with his approval. The full APG contains 79 pages.

Part I of the APG is entitled "Introduction: scope, background and purpose of the memorandum." It contains general observations on the expenditure of effort by the FTC in the past to regulate the abuses of the direct selling industry, a conclusion that the FTC has as yet made little effort to gain an overall perspective on the industry and reference to the question raised by some members of the staff whether the FTC should be involved in regulation of the industry. The stated purpose of the APG is "to provide as adequate a direct selling industry overview as possible and, on the basis of that overview, to propose an appropriate comprehensive FTC regulatory policy to control the industry's abuses."

A secondary purpose is indicated as providing a study of the industry which will preserve relevant experience and ideas of staff for the benefit of future staff when problems in the industry arise.

The sections of the APG, other than the Introduction, are

II. Industry profile, social and economic significance of the industry; patterns of industry regulation; industry trends.

III. Direct selling industry abuses; FTC resource allocation in dealing with these abuses.

IV. Survey of past, present and contemplated FTC direct selling industry regulatory action.

V. Regulatory alternatives; proposed regulatory goals and strategies; evaluation of present programs.

VI. Summary of policy considerations and recommendations.

Clearly enough direct selling of encyclopedias by Britannica and others is within the scope of the APG. The field is divided into high ticket and low ticket categories, based on price, and among thirteen so-called high ticket categories, the sixth includes encyclopedias and other book-form publications and educational services. In a survey of pending and planned regulatory actions in the field, there is reference to the recommendation pending before the Commission that a complaint be issued against Britannica, along with a reference to an already issued complaint against Grolier, Inc. and consideration of a possible complaint against Field Enterprises, Inc., Britannica's largest competitors.

According to a Second Revised Index filed by the Commission in the FOIA action in district court, the APG "was used by the Bureau of Consumer Protection to evaluate existing and proposed activities in the direct selling industry and was submitted to the Commission as a proposal for such use by the Commission. It was never finally adopted by the Commission."

Summaries in the index do indicate that in portions of APG not disclosed, the author referred to the proposed form of remedial order recommended by the staff to be served with the complaint against Britannica. These references occurred in the course of his survey of past regulation, his discussion of his views as to appropriate order provision, and his discussion of rules which the Commission could adopt. Summaries also indicated that the APG had been submitted to the Commission by Mr. Pitofsky July 31, 1972, with recommendations; that various Commissioners had exchanged their views by memoranda, and

that on November 1, 1972, the Commission had directed the staff to perform specified internal tasks with reference to APG.

District Judge Roszkowski, in ordering judgment for the Commission in the FOIA case, noted that he had examined *in camera* the APG and related material. "We have compared the contents of the APG with the allegations found in the Commission's complaint in Docket No. 8908 and find them to be substantially dissimilar." After examining the related materials, he stated, in part, "We simply add that these seventeen documents do not contain private transmittals of binding Commission opinions or legal interpretations which in any fashion constitute secret agency law."

We have before us the formal assurance of the Commission that it has based its determination and order solely upon the record in this proceeding. We must presume that the regularity of administrative action, and accordingly members of the Commission and the ALJ knew and observed the distinction between an adjudicatory proceeding and consideration of problems and policies relevant to the general administrative responsibilities of the Commission. *See United States* v. *Chemical Foundation,* 272 U. S. 1, 14-15 (1926). We have carefully read the disclosed portions of the APG and the Commission's summaries of the omitted portions and related documents. All are consistent with the APG being a generalized study with recommendations of programs which the Commission might, but apparently has not directed its staff to implement. We have the benefit of Judge Roszkowski's reactions after reading all the material.

We are not persuaded of any probability that the fact finding in this adjudicatory proceeding has been influenced by assertions in the APG or that either the ALJ or Commission felt that his or its discretion had been constrained by the APG or any Commission treatment thereof.

The order under review will be affirmed and enforced.

WOOD, *Circuit Judge,* dissenting.

I respectfully dissent. The issues are fairly presented in the majority opinion, but my view differs.

Britannica does not question on appeal the Commission's underlying findings about prior sales techniques, but objects to the prescribed cures which go beyond a mere cease and desist order. First, the company objects to the requirement for the use of a warning card by sales representatives, and secondly, to the inclusion in all lead-producing advertisements as well as in any provided mail response forms, the "Notice to Consumer" warning.

The Commission has seen fit to dictate the exact size of the warning card, 3″ x 5″, the exact language to be printed on it and "none other," and even the particular type to be used in its printing, 10-point bold-face type. Further, with this card in hand a salesman is directed to immediately give it to a prospect and to "direct each such person to read it" before anything else is said or done. The Commission has similarly dictated the wording, size, and type to be used in the "Notice to Consumer" to be contained in the advertising and has specified where the warning is to be placed on return forms. Those measures have been ordered by the Commission without any apparent consideration of the adverse side effects upon Britannica likely to result from its prescription, or the use of less onerous alternatives to accomplish its same purposes. I do not see in the record any implication, much less any clear implication as the majority does that the remedies are the result of a reasoned determination or analysis.

Britannica has suggested acceptable alternative measures to accomplish the same purposes which the company views as not offending legal and constitutional standards. For example, it is suggested that instead of the dictated sales representative's warning card that a fully identifying business card be used coupled with an oral disclosure of the purpose of the sales representative's contact. Britannica suggests that its sales people would be trained to reveal their sales purposes and to avoid anything misleading. Britannica also argues that it should have a little more

freedom in composing its own advertising. The company does not object to the elimination of anything which might suggest that a prospect will not be contacted by a sales representative. The company also would be willing to clearly disclose, but in its own words, that prospects who respond to advertising may likely be contacted by a sales representative.

In my view this is a case where an agency, though with good intentions, in its big brother role has unnecessarily intruded too far into the conduct of legitimate business. The Commission surely has more compelling responsibilities than to dictate the size, wording, and printer's type to be used inflexibly by the company. Britannica was not given the opportunity to propose or to submit any less damaging forms of remedies to the Commission for prior review.

The remedies appear to me to go beyond any reasonable cure and are more akin to bureaucratic punishment imposed upon a company found by the Commission to be errant. Britannica makes plain the severe, adverse business impact which can be anticipated by its use of the prescribed stark warnings and procedures. It seems to me that to require a salesperson to use the warning card will suggest to many prospects that the sales representative and his company are afflicted with some strange market place malady. Even prospects who are predisposed to acquire for themselves and families the wealth of information found in an encyclopaedia may be expected to turn to some competitor who does not exhibit such abnormal and strange commercial behavior. After all, to be disturbed by the unexpected call of a sales representative or even to suffer a change of mind after purchase of an encyclopedia ordinarily would not be viewed as injurious to a customer's health. Those persons who show any interest in encyclopaedias may be expected to be those with enough intelligence not to be hopelessly at the mercy of sales representatives. I see no need for making all prospective customers wards of the government when something less may suffice.

When Justice Stevens was a member of this court, he wrote in *Papercraft Corp.* v. *Federal Trade Commission*, 472 F. 2d 927, 933 (7th Cir. 1973):

> "We are conscious of the deference to be accorded to the expertise of the administrative agency, particularly in the fashioning of remedies. But when it selects an untried and blunt instrument which will certainly cause some impairment of statutory objectives [competition], we require a more careful exposition of its justification before we will sanction it as a proper remedial tool. The Commission failed to make an adequate demonstration of the need for its exceptional remedy."

That comment is not without some relevance to this case. We are not bound by our deference to the Commission's expertise to sanction any remedy the Commission may impose without explanation, or analysis, or any other visible justification when there is the reasonable likelihood that something less harsh to a legitimate business would accomplish the same Commission objectives. As in *Siegal Co.* v. *Federal Trade Commission*, 327 U. S. 608, 613 (1940), we are left in the dark as to why some less drastic and damaging remedy would not suffice.

The Commission has brought to our attention the Supplemental Opinion on Petition for Rehearing in *Warner-Lambert Co.* v. *Federal Trade Commission*, 562 F. 2d 749 (D. C. Cir. 1977). That opinion explains why certain corrective advertising was considered justified to overcome 50 years of deceptive advertising in which Listerine had been proclaimed and purchased as a remedy for colds. However, even in those circumstances Judge Robb dissented on the basis that the corrective advertising was beyond the Commission's statutory authority and that the Commission had no authority to punish or impose liability for past conduct. In any event, there is no lingering effect of prior advertising needed to be overcome in the present case.

I would prefer to deny enforcement of the Commission's order and remand for reconsideration of a more appropriate remedy to be supported by a rational analysis.

There remains the additional issue involving certain materials sought by Britannica under the Freedom of Information Act which the company fears may have exerted some influence on the Commission outside the record. A separate appeal is pending which is an outgrowth of that issue. The majority presumes the regularity of the administrative action. Since the objectionable remedies imposed stand unsupported in the record, I would wait in the resolution of this case until we are fully informed about the other appeal and its possible effect, if any, upon this case. That would consolidate related matters and avoid to some extent having to rely on implications and presumptions in resolving this case.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE MATTER OF

ENCYCLOPAEDIA BRITANNICA, INC., ET AL.

Order, Opinion, etc., in Regard to Alleged Violation of The Federal Trade Commission Act

Docket 8908. Complaint, Dec. 11, 1972—
Final Order, Mar. 9, 1976

OPINION OF THE COMMISSION

BY DOLE, *Commissioner:*

[1] This matter is before the Commission on appeal of Encyclopaedia Britannica and its wholly-owned subsidiary, Britannica Home Library Services, respondents [hereinafter referred to as "respondent"], and the cross-appeal of complaint counsel from the initial decision of Administrative Law Judge Ernest Barnes in the above-styled proceeding. Judge Barnes found that respondent had engaged in deceptive acts in the recruitment of sales personnel and in the promotion and sale of encyclopedias, other books and related services. Judge Barnes also found that respondent had engaged in deception in its manner of gaining entry into the consumer's home and in its debt collection practices.

FTC OPINION

Encyclopaedia Britannica publishes, sells and distributes throughout the world, textbooks, encyclopedias, reference and educational materials, other literary works and services, and training courses. Respondent's products, in addition to Encyclopaedia Britannica, include Compton's Encyclopedia, Great Books of The Western World, and Great Books Reading Plans. Encyclopaedia Britannica makes the most substantial portion of its sales in the home. It maintains a sale force [2] of some 2,000 sales representatives which it recruits, in part through newspaper advertisements.[1] Britannica Home Library Services

1. I. D. at 8-10.

sells and distributes books and other merchandise through advertising and mailings.[2] It is engaged exclusively in a mail order business throughout the United States.

Judge Barnes' order places respondent under certain prohibitions and requires it to take certain affirmative actions in connection with respondent's recruitment of sales representatives, its debt collection practices, its product marketing and distribution practices in the home and its advertising.

The thrust of respondent's appeal in this matter concerns the order.[3] Respondent's principal concern is with the order's requirement that Britannica's representative present a 3" x 5" card at the time admission is sought into the home for the purpose of soliciting a sale. Britannica's representative must direct the consumer to read the card on which is printed in 10-point, boldface type: (1) the name of the corporation; (2) the name of the sales representative; (3) the term "Encyclopedia Sales Representative"; (4) the statement, "The purpose of this representative's call is to solicit the sale of encyclopedias"; and (5) the statement, "This card should be kept as part of your permanent records of this transaction."[4]

Except in one respect, hereinafter noted, the Commission upholds the administrative law judge's order provisions requiring the 3" x 5" card disclosure. Respondent's training tapes, which are required to be used in the instruction of all of its sales representatives,[5] emphasize that training in effective sales techniques

2. I. D. at 111. Encyclopaedia Britannica formulates, directs and controls the acts and practices of Britannica Home Library Services. *Ibid.*

3. We reject outright respondent's contention that Section 5 of the Federal Trade Commission Act does not extend to recruitment practices, *see, e.g., Educators Association Inc.* v. *FTC,* 108 F. 2d 470, 472 (2d Cir. 1939), *modified on other grounds,* 118 F. 2d 562 (2d Cir. 1941), and that these practices were "local," see I. D. 86-87.

4. Order Paragraphs 11(D) and (E).

5. Tr. at 3124 (Mr. Holmes); see Tr. at 3173-74 (Mr. Martinez).

is "all meaningless if you can't get in [3] the home of a prospect. * * *"[6] We have concluded that respondent's sales representatives have been trained to disguise the main purpose of the visit in a way which deceives the consumer as to the real reason the representative seeks admittance to the home—to make a sale. For example, respondent's representatives are trained to deliver verbatim a three-paragraph spiel[7] which respondent characterizes "as having the distinct advantage" of allowing the representative to approach the prospect's door "not in the role of a salesman" but rather in the role of a company representative who is delivering a free booklet and making an advertising effectiveness survey.[8]

While one of the reasons claimed for delivering the requested booklet in person is to conduct an advertising survey, it is nevertheless clear from the explanation which accompanies the three-paragraph "door approach" that this reason is a guise to gain entry for the purpose of making a sales pitch. Respondent's tape explains the "accomplishments" of the door approach [4] as follows: "[W]e have identified ourselves,"[9] and, by hand delivering the requested booklet, "we have taken a giant step toward overcoming, before it arises, their objection,

6. CX 647-A (training tape, "Door Approach and A. R. A.").

7. "Hello, Mr. Jones, I'm Bill Smith from the Great Ideas Program. Someone in your family requested a free booklet, and I stopped by to deliver it. Incidentally, it's free."

"You're welcome, Mr. Jones. You see, one of the reasons we are delivering the booklet in person is that the company is making a study of the effectiveness of our national advertising in each local area. Our director of advertising has instructed me to check your answers to a few quick questions. May I step in and complete my report so I can return it at once to our director of advertising?"

"Actually, Mr. Jones, it's only six simple questions. We hope this will enable us to spend our advertising appropriation more wisely. Perhaps this letter from our director of advertising will better explain the purpose of our advertising analysis. Do you mind if we step inside so you can take a moment to read the letter?" *Ibid.*

8. *Ibid.*

9. The caller is not identified as a sales representative. See footnote 7.

'all we wanted was the booklet.' " By handing the prospect the book "in a frank and confident manner, we also appear harmless to the prospect. * * *" The advertising survey "explains one of the reasons for our call, takes us out of the role of a salesman" and affords the prospect a reason "to honor our request for admission to his home—not in the role of a salesman." Since "[s]ome of them do not respond at this point because they are skeptical or may simply believe you are a salesman," the prospect is shown a letter from the advertising director which adds "authenticity to the purpose of our call" and which conditions the prospect to give "a positive response to our request to step inside, still not in the role of a salesman." Respondent underlines the importance of the door approach by promising that, if it is learned and delivered verbatim, the sales representative has:

> * * * the guarantee established by hundreds of Great Book salesmen who have used it over the years in the field that it will get you into the largest number of homes of any door approach ever used by any company * * *.[10]

The company-prescribed disguise techniques[11] necessitate inclusion of an order provision requiring clear and conspicuous disclosure of the fact that the representative is a salesman [5]

10. CX 647-A (training tape, "Door Approach and A. R. A.").

11. Other examples are found in respondent's "Telephone Talks," which are used to obtain access to the home at an appointed day and time. The opening line of the "Telephone Talks" contains the statement, "I am calling to give you the details on how to obtain the new Britannica Program," *e.g.* CX 582-B. The consumer is then told that he or she has won a free medical encyclopedia and will be entered in another drawing. "Everything will be explained in detail in the free Gift Certificate that we will give you so you can receive your medical encyclopedia, *and* to enter you in the $500 educational award drawing. I simply have to stop by to certify the free Gift Certificate you and M. - - - - - together * * *." CX 582-C (emphasis in original); CX 582-D (emphasis in original); CX 582-B (emphasis supplied).

The opening line, if construed as a sales pitch disclosure, is effectively countermanded by the remainder of the talk so that the consumer remains deceived as to the real reason for the visit.

and of the true purpose of gaining entry into the home. We point out additionally that the company has taught its sales representatives to affirmatively misrepresent the true purpose of the call, even when asked. This occurs, for example, in a training tape dealing with the "telephone appointment plan," which is an approach technique used in conjunction with another method of promotion, "give-aways." After the consumer has been told that he or she has won a consolation prize, a medical encyclopedia, the representative states that "there is absolutely no obligation on your part. You don't have to buy Britannica; you don't even have to listen to a sales presentation." When the representative is asked directly the reason for his visit, the tape instructs the sales representative to reply that he "simply [has] to stop by and certify the gift certificate * * *."[12]

[6] Judge Barnes' order would require a statement on the 3" x 5" card that "This card should be kept as part of your permanent records of this transaction." This statement does not appear to be necessary in order to provide a clear and con-

12. CX 619 (training tape, "Telephone Appointment Plan").

The tape purports to be drawn from actual phone calls with consumers. CX 620-C.

> [Consumer:] Could I ask you, what are you coming here for, what are you going to do?
>
> [Sales representative:] Well, as I explained * * *
>
> [Consumer:] Don't come here for nothing. Let's put it that way. I'm not buying any encyclopedias.
>
> [Sales representative:] Yes, well did you understand the other things I said to you, Mrs. Feinberg? You not only have the medical encyclopedia, which is yours, but you are also going to be entered into a drawing, to be held the 15th of next month, for an additional $500 educational award. As I said, everything will be explained in detail in this free gift certificate that we'll give you so that you can receive your medical encyclopedia and we can enter you in the additional $500 award drawing. *I simply have to stop by and certify the gift certificate with you and Mr. Feinberg, together. That's the purpose of my call.*
>
> [Consumer:] O. K. Fine, if that is what it is, then fine.

CX 619, CX 620 T & U. (emphasis supplied).

spicuous disclosure of the nature and purpose of the call. The other elements of the card disclosure and the size of the card should suffice in this regard.

As to respondent's recruiting advertisements, Judge Barnes' order requires respondent to describe the positions offered as "door-to-door" selling.[13] Respondent contends that the terms will be construed by job seekers as "cold canvassing," which means selling door-to-door without leads or previous appointments.[14] Respondent requests that, at most, it should be required to designate its selling method as "in home," a phrase which encompasses various approaches. We think respondent's position is a reasonable one, and complaint counsel does not oppose the designation.[15] We have accordingly modified order Paragraph I(B)(2).

Respondent also objects to the required disclosure in its job offer advertisements that it is "recruiting persons for the sole purpose of selling" and to the related provision prohibiting respondent from representing to prospective sales representatives that they will be trained in management or [7] in office administration.[16] Respondent contends that the "sole purpose of selling"

13. Order Paragraphs I(A) and (B).

14. According to respondent, "cold canvassing" selling is viewed with great disfavor by job applicants, particularly when the product involved is an expensive one, such as encyclopedia. Judge Barnes' order requires respondent to disclose the products, *e.g.*, encyclopedia, in the recruitment advertisements. Order Paragraph I(B)(3).

15. Complaint counsel requests that, if respondent's version is granted, respondent should be specifically prohibited from representing that the position being advertised involves no "cold canvassing" or words of similar import. Complaint counsel claims that respondent's practice has been to represent that no "cold canvassing" is utilized at all and that, in fact, respondent does utilize this sale method as an alternative approach. Order Paragraph I(A)(1) bars respondent for misrepresenting, *"in any manner,* the job for which any person is being solicited." (Emphasis supplied). That provision precludes respondent from misrepresenting that no "cold canvassing" is utilized and appears to be an adequate remedy without further specificity.

16. Order Paragraph I(A)(2) and (B).

disclosure will preclude it from truthfully advertising for genuine managerial openings which involve an element of selling but which are not solely selling jobs. We see no reason, however, to strike this disclosure. The disclosure is triggered only if the recruit is to engage in "door-to-door sales,"[17] and as the administrative law judge found, it was Encyclopaedia Britannica's policy "to hire everybody, initially, as a door-to-door salesman and to develop managers from within the ranks of its own salesman * * *."[18] The provision addresses this practice.

The prohibition against representing that sales recruits will be trained in management or administration is responsive to the administrative law judge's finding that respondent did not maintain a management training program as such. Judge Barnes found, moreover, that respondent did not begin to train persons for managerial positions until they had been promoted to "Deputy Field Trainer," some four to six months after they had worked exclusively as a sales representative.[19] Accordingly, we uphold Judge Barnes' order in this regard.[20]

The order prohibits respondent from making guaranteed income claims unless at least thirty percent (30%) of the persons holding similar positions in the office offering the position received an equivalent or greater income during the preceding twelve months.[21] We have deleted this provision. The modified order bans misrepresentations of guaranteed income. A related order provision requires affirmative disclosure, prior to the time respondent enters into a guaranteed income employment contract, of the percentage of persons employed in similar positions

17. Order Paragraph I(B).

18. I. D., Finding 24.

19. *Ibid.*

20. We agree with complaint counsel's suggestion that should respondent determine to develop or expand into a *bona fide* managerial or administrative training program it may petition the Commission for modification of relevant order provisions.

21. Order Paragraph I(A)(3).

who earn the stated income.[22] The ban on misrepresentations, coupled with the disclosure, should suffice to correct respondent's guaranteed income deceptions.

[8] We uphold, with slight modification, the provisions in the order[23] which require that a letter and portions of the order[24] be furnished prospective sales recruits at the initial interview. The letter explains that employees must obey the Commission's order. Complaint counsel argues for a stronger letter warning and respondent requests that it be required to furnish only an oral summary of the order. Having considered the arguments,[25] we have concluded that the letter should also state explicitly that the failure of respondent's employee to abide by the order's provisions constitutes a violation of a Federal law. The letter attached as Appendix A of the order has been modified to comport with this determination. Respondent, if it chooses, may provide the prospective employee with an explanation, either orally, in writing or both, of the pertinent provisions of the order, but the Commission has determined not to modify the requirement that respondent furnish copies of the provisions specified.

In connection with its merchandising program, Judge Barnes found that respondent had misrepresented the value of the merchandise and services being offered for sale to consumers as well as "savings" claims. The claimed retail prices of respondent's publications which are utilized by sales representa-

22. Order Paragraph I(C)(5).

23. Order Paragraph I(D).

24. Paragraphs I-III and VI.

25. Complaint counsel's letter would point out that substantial penalties can be imposed for a knowing violation of the order and would also invite the reader to report suspected violations to the Commission.

Respondent contends that the negative implications of the order will inhibit respondent's recruiting abilities and requests that respondent be permitted, instead, to require a recruit to study the order at the completion of his training, when the order "might be comprehensible to him." Appeal Brief of Respondents at 40, n.**

tives in selling the product do not reflect prices at which such publications have been sold in substantial quantities to the general public.[26] The administrative law judge found that the number of Great Books and Encyclopaedia Britannica that were sold at retail prices were less than 9 percent and less than 3 percent, respectively. In response to these findings, Judge Barnes prohibited respondent from representing a price for a [9] product as its regular retail price unless at least forty percent (40%) of its unit sales for the product is made at that price, or higher, for the previous six months.

We are not persuaded that the order should depart from the Commission's guides, *Deceptive Pricing*, 16 C. F. R. § 233. The Guides provide, *inter alia*, that the retail price may be described as a selling price if "substantial" sales are made at the retail level. We have accordingly modified the "retail price" provisions[27] and the "savings claims" provisions.[28]

We also agree with the argument on appeal that the order should require respondent to attach to each consumer contract a price list and a list of items being offered for free and to disclose orally at the signing of the contract that a price list is attached. Judge Barnes found that the sales presentation was designed to mislead the purchaser into believing that substantial savings are to be achieved when in fact there are no savings and no merchandise is given free.[29] The administrative law judge determined that to require a "cooling-off" period would provide effective protection for consumers from respondent's misrepresentations and deceptions. Accordingly, he ordered respondents to comply with the *Cooling-Off Period For Door-To-Door Sales*, 16 C. F. R. § 429.1. While the administrative [10] law judge was correct in ordering compliance with the Cooling-Off Rule, the Commission has modified the order to require the furnishing

26. I. D. Finding 68.
27. Paragraphs II I(1) and (2).
28. Paragraphs II I(3) and (4).
29. I. D. at 96.

of a list of current prices of respondent's products and a list of free items. This information will enable the contracting consumer to appraise the strength of his bargain—to compare the contract with the authorized list prices and determine whether or not any savings claim is true and whether any claims of free items are, in fact, accurate. The contracting consumer has no other basis to gauge the truthfulness of respondent's savings claims or offers of free items unless respondent furnishes this information. We reject respondent's claim that to require it to supply this information is burdensome[30] or unwarranted.[31]

We have also modified order Paragraph II(F) 5(b) so as to preclude respondent from offering an item as "free" unless, *inter alia*, no publication, merchandise or service has been offered as "free" for six months of the last twelve. As presently drafted an item could be offered as "free" if that item had not been offered as "free" for six months of the last twelve. Without this order change, respondent could substitute different items as the "free" item at six-month intervals and thus represent that an item is "free" although the price for the item was included in the regular price of the goods.

We turn now to that portion of the order dealing with advertising or promotional material that solicits participation in a contest or solicits a response to an offer of information or product. Judge Barnes' order[32] requires respondent to disclose to

30. Indeed, Britannica has begun a similar practice of voluntarily disseminating a price booklet at the time of sale. See Tr. at 3216-18, (testimony of Mr. Martinez).

31. Since the order bans use of the cooperative offer in connection with which the savings claims were made, respondent contends that there is no need for the lists or the disclosure. We are not impressed with the argument; savings claims can take a number of forms and are not limited to sales based on cooperative offers. See *Standard Educators, Inc.* v. *FTC*, 475 F. 2d 401, 406 n. 2 (D. C. Cir. 1973) (specially reduced price to member of military); *Basic Books, Inc.* v. *FTC*, 276 F. 2d 718, 720 (7th Cir. 1960) (reduction in regular price for a limited time); *American Marketing Associates, Inc.*, 73 F. T. C. 213, 264-65 (1968) (mothers' club membership plan).

32. Order Paragraphs II(A) and (B).

readers that those who reply may be contacted by a salesman. A similar disclosure is required in the return card or coupon which accompanies the advertising or promotional material. The Commission has determined that these order provisions are needed to inform the consumer that the card or coupon response will trigger the delivery of material and information by [11] a sales representative whose call is for the purpose of selling. Such knowledge cannot be gleaned by the consumer who reads the ads or who enters the contest. The ads mislead the consumer in that the wording portrays all information as coming by mail and direct from the publisher.[33] A number of contest entry cards portray the give-away merely as a celebration of the company's bicentennial and suggest that a consumer who fills in the card will not be imposed upon.[34] We reject respondent's contention that disclosure is unnecessary and that the language of the disclosure is "negative."

We accept the contention that the order's requirement that respondent comply with the Commission's trade regulation rule dealing with negative option plans[35] be deleted. The prohibitions and affirmative disclosures as set forth in the order[36] deal elaborately and sufficiently with the abuses in respondent's continuity program.

* * * * *

We are not persuaded by the other contentions made by counsel. Thus, we reject complaint counsel's request for provisions dealing with respondent's billing practices,[37] and we reject complaint counsel's request that the order require respond-

33. I. D., Findings 84-85.

34. I. D. at 98-99.

35. *Use of Negative Option Plans By Sellers In Commerce,* 16 C. F. R. § 425.1 (1973).

36. Paragraphs IV(A)(B)(C) and (D).

37. The terms of the Fair Credit Billing Act, 15 U. S. C. § 1601, *et seq.* (1974), are applicable to respondent's practices.

ent to survey its customers in order to elicit violations of the order.[38]

Having considered the arguments in this matter, we have concluded that the public interest is best served in this proceeding by the issuance of the attached order.

Final Order

This matter having been heard by the Commission upon the cross-appeals of complaint counsel and respondents' counsel from the initial decision and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having granted the appeals in part:

It is ordered, That pages 1-117 of the initial decision of the administrative law judge be, and they hereby are, adopted as the findings of fact and conclusions of law of the Commission, with the following exceptions: those portions of pages 103-110 ("The Remedy") which are inconsistent with the opinion of the Commission herein.

Other findings of fact and conclusions of law of the Commission are contained in the accompanying opinion.

It is ordered, That respondent Encyclopaedia Britannica, Inc., and its successors and assigns, officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary, division, or other device, in connection with the recruitment of persons to sell, rent, lease, or distribute any textbook, encyclopedia, reference, or educational material, or any other publication, merchandise, or service, in commerce, or

38. However, we accept the suggestion of complaint counsel that recruiting activities should be included within the proscription of Paragraph III of the order. Paragraph III prohibits respondent from making any representation or instruction through its training tapes or other documents which is inconsistent with Paragraph II of the order. We have added Paragraph I, recruitment activities, to the proscription of Paragraph III.

affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I

A. Representing, directly or by implication, either orally or in writing, that:

(1) Respondent is offering positions in such fields as advertising analysis, public relations, marketing, interviewing, or in any field other than door-to-door sales, if door-to-door sales is included, to any extent, in the position for which persons are being recruited; or misrepresenting, in any manner, the job for which any person is being solicited;

(2) persons will be trained as management trainees, or for other positions of responsibility concerned with administrative office functions; or misrepresenting, in any manner, the amount and type of training that will be given;

(3) any person who may be employed will contact prospects in their homes or places of business for the purposes of conducting surveys, advertising promotions, or other nonselling functions; or misrepresenting, in any manner, the purposes for which any person is engaged.

B. Misrepresenting, in any maner, the amount of income to be earned by any person or that may be earned by any person, the method of payment, or any condition or limitation imposed upon the compensation of any person.

C. Failing to disclose, clearly and conspicuously, in all advertising offering employment in any way involving door-to-door sales:

(1) that respondent is recruiting persons for the sole purpose of soliciting or selling;

(2) that such soliciting or selling will be on an "in home" basis;

(3) that the products or services being sold are encyclopedias or services to be used in connection therewith, or in the event that encyclopedias or such related services are not being sold, the products and services being sold; and

(4) the basis for compensating persons so engaged.

D. Failing to clearly and conspicuously advise, both orally and in writing, any prospective sales employee at the initial face-to-face interview, and prior to executing any employment agreement with any such person, the following information:

(1) All those disclosures set forth in Paragraph I C above;

(2) a complete and detailed description of each condition and limitation imposed upon the receipt of any compensation;

(3) where applicable, notification that such person will not be paid for time spent during orientation and training;

(4) a complete and detailed description of any expense or expenses any such person may incur in performing the required duties; and

(5) the percentage of persons holding similar positions engaged by the office offering the position during the twelve (12) months immediately preceding the offer, who have actually received an equivalent, or greater, income than that promises under the terms of any such agreement.

E. Failing to furnish to persons at the initial face-to-face interview, and prior to executing any employment agreement with any such person, a copy of Paragraphs I, II, III and VI of this order, together with a cover letter as set forth in Appendix A attached hereto.

II

It is further ordered, That respondent Encyclopaedia Britannica, Inc., and its successors and assigns, officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary, division or other device, in connection with the publishing, advertising, offering for sale, sale, rental, lease or distribution of any textbook, encyclopedia, reference or

educational material; or any other publication, merchandise or service. in commerce, or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Disseminating or causing to be disseminated any advertisement or promotional material which solicits participation in any contest, drawing or sweepstakes, or solicits any response to any offer of merchandise, service or information unless any such solicitation clearly and conspicuously discloses the following statement in 10-point boldface type: NOTICE TO CONSUMER—PERSONS WHO REPLY AS REQUESTED MAY BE CONTACTED BY A SALESPERSON FOR THE PURPOSE OF SELLING [insert name of applicable product].

B. Providing any return card, coupon or other device which is used to respond to any advertisement or promotional material covered by Paragraph II A above, unless the following statement clearly and conspicuously appears in 10-point boldface type in immediate proximity to the space provided for a signature or other identification of the responding party: NOTICE TO CONSUMER—PERSONS WHO RETURN THIS [insert name of applicable device] MAY BE CONTACTED BY A SALESPERSON FOR THE PURPOSE OF SELLING [insert name of applicable product].

C. Failing to disclose clearly and conspicuously, at the beginning of any telephone call to any prospective customer, the fact that the individual making the call is either soliciting the sale, rental or lease of publications, merchandise or services for respondent, or is arranging for a sales solicitation to be made, and that if the prospective customer so agrees, respondent will send a salesperson to visit said prospect for the purpose of soliciting the sale, rental or lease of said publications, merchandise or services.

D. Visiting the home or place of business of any person for the purpose of soliciting the sale, rental or lease of any publications, merchandise or service, unless at the time admission is sought into the home or place of business of such person, a card 3 inches by 5 inches in dimension, with all words in 10-point bold-face type, with the following information, and none other, in the indicated order, is presented to such person.

(1) the name of the corporation;

(2) the name of the salesperson;

(3) the term "Encyclopedia Sales Representative" [or other applicable product];

(4) the terminology: "The purpose of this representative's call is to solicit the sale of encyclopedias" [or other applicable product].

E. Failing to give the card, required by Paragraph II D, above, to each such person, to direct each such person to read the information contained on such card, and to provide each such person with an adequate opportunity to read the card before engaging any such person in any sales solicitation.

F. Representing, directly or by implication, either orally or in writing that:

(1) Any person calling on any prospective purchaser is:

(a) engaged in or connected with "advertising," "marketing," "promotion," "education" or anything other than the door-to-door sale of encyclopedia or other reference materials.

(b) conducting, taking or participating in a survey, advertising research analysis or any other information gathering activity, or

(c) calling on said prospect for the primary purpose of delivering or disseminating prizes, gifts, gift certificates, chances in any contest, drawing, sweepstakes, educational fund or any other merchandise or item of chance;

(2) only a few minutes will be required to complete the visit inside the prospective purchaser's home or place of business; or

misrepresenting, in any manner, the period of time required to complete the sales or other presentation;

(3) an offer is limited, must be accepted immediately or within any specified time period, or is a special offer, unless such is a fact; or misrepresenting, in any manner, the duration of any sales offer;

(4) any publication, merchandise or service is being offered free, without cost, or is given as a bonus or otherwise to any prospective purchaser of respondent's publications, merchandise or services agreeing to perform any advertising, promotional or selling function, including but not limited to, any of the following acts or similar acts:

(a) permit their names to be listed as local owners of the product or service;

(b) provide the name of any person who may be interested in purchasing any publication, merchandise or service;

(c) write a letter evaluating the merits of any publication or other item which may be used in advertising; or

(5) any publication, merchandise or service is being offered free, without cost, or is given as a bonus or otherwise to any purchaser of respondent's publications, merchandise or services, pursuant to any agreement to purchase, rent or lease any other publication, merchandise, service or combination thereof from respondent, unless:

(a) the contract price for the purchase, rental or lease of any such other publication, merchandise, service, or combination thereof, has remained at the said price or above for at least six (6) months within the last twelve (12) months immediately preceding the time at which the representation is made;

(b) no publication, merchandise or service has been offered free, without cost or given as a bonus or otherwise with the sale, rental or lease of any such other publication, merchandise, service or combination thereof, to any person for a period of at

least six (6) months within the last twelve (12) months immediately preceding the time at which the representation is made; and

(c) no publication, merchandise, service, or combination thereof, of equivalent or greater value, has been eliminated by respondent from any such other publication, merchandise, service, or combination thereof, with which the free, without cost or bonus publication, merchandise or service is being offered;

Provided, however, Any such prices as are restricted by Paragraph II F (5)(a) of this order may be altered at any time by respondent to reflect *bona fide* changes in market conditions.

G. Representing, directly or by implication, either orally or in writing that:

(1) Any person using any research service will receive answers to questions regarding all subjects other than legal or medical advice; or misrepresenting, in any manner, the research service that will be furnished to subscribers;

(2) any answer provided by any research service is the product of detailed, exhaustive or original research generated by the specific question asked by any person utilizing said service, unless such is the fact; or misrepresenting, in any manner, the extent of research, preparation or quality of any answer furnished by any such research service.

H. Failing to disclose, clearly and conspicuously, in writing on all promotional materials describing any research service, and orally during the course of any sales or other presentation relating to said service, each condition or limitation placed upon the use of such research service.

I. Representing to any person directly or by implication, either orally or in writing that:

(1) any price is the retail, regular, usual or words of similar import or effect, price for any publication in any binding, mer-

chandise or service, unless respondent is making a substantial number of its unit sales for each such publication in each such binding, merchandise or service, individually, at or above the represented price;

(2) any price is the retail, regular, usual, or words of similar import or effect, price for any set of publications in any binding and in combination with any other publication, merchandise or service, unless respondent is making a substantial number of its unit sales for each such set of publications in each said binding individually or in combination at or above the represented price;

(3) savings may be realized by the purchase, rental or lease of any publication, merchandise or service, or any combination thereof, from respondent's former prices for its products unless:

(a) such savings claims are based upon retail, regular, or usual prices, or combination prices, arrived at in accordance with Paragraph II I(1) and (2) above;

(b) respondent clearly and conspicuously specifies the publication, merchandise or service, or combination thereof, and the price from which the savings are to be realized; and

(c) the publication, merchandise or service is of comparable quality in all material respects with the publication, merchandise or service sold at the higher price;

(4) savings may be realized by the purchase, rental or lease of any publication, merchandise or service, or any combination thereof, from comparable products of competitors unless:

(a) respondent clearly and conspicuously specifies the publication, merchandise or service, or combination thereof, from which the savings are to be realized;

(b) the price utilized for comparison purposes is the price at which a substantial number of persons have purchased the item referred to in (a) immediately above;

(c) the item referred to in (a) above is of comparable quality in all material respects to the product being sold.

J. Misrepresenting in any manner, either orally or in writing:

(1) the amount of savings to be realized by any person who enters into an agreement with respondent for any publication, merchandise or service; or

(2) that any publication, merchandise or service is being offered free or without charge, or is given to any such person.

K. Failing to comply with any and all provisions of the Commission's Trade Regulation Rule, *Cooling-Off Period For Door-To-Door Sales,* (16 C. F. R. § 429.1), which are in effect on the date this order becomes effective, and with any modifications or changes in the aforesaid rule which may be made from time to time. A copy of the said rule shall be made a part of this order for purposes of complying with other provisions hereof.

L. Initiating contact with any purchaser through any means for any reason from the time said purchaser enters into any agreement containing a NOTICE OF CANCELLATION, as required by Paragraph II K of this order, until said buyer's cancellation period has expired.

M. Failing to maintain a copy of each NOTICE OF CANCELLATION received pursuant to Paragraph II K of this order, and making said documents available for inspection and copying by the Commission's staff upon reasonable notice. Any such NOTICE shall be maintained for a period of three (3) years from date of receipt by respondent.

N. Failing to keep adequate records, which shall be maintained for a period of three (3) years and made available to the Commission's staff for inspection and copying upon reasonable notice, from which the validity of any savings claims, retail price claims, comparative value claims, or other representations of the type described in Paragraphs II F(5), II I and II J of this order can be determined.

O. Failing to attach to any contract for the sale, rental or lease of any publication, merchandise, service or combination

thereof a written statement that clearly and conspicuously discloses, and only discloses, the following information in the indicated order and manner: (1) in 12-point boldface type size the terminology:

PRICE LIST

THE FOLLOWING PRICES ARE THE *only* AUTHORIZED PRICES AT WHICH THE LISTED ITEMS MAY BE OFFERED. ANY PRICE NOT LISTED BELOW IS UNAUTHORIZED AND FALSE!

(2) a list of all publications in each binding, merchandise, service or combination thereof currently offered for sale, rental or lease, and in immediate conjunction thereto each price at which respondent is authorized to offer said product or service pursuant to Paragraph II I of this order.

(3) in 12-point bold-face type the terminology:

FREE ITEMS

ONLY THE FOLLOWING PRODUCTS AND SERVICES MAY BE OFFERED FREE. YOU ARE PAYING FOR ANY ITEMS RECEIVED AND NOT LISTED BELOW!

(4) a list of all publications, merchandise or services currently offered as free, without cost, or as a bonus pursuant to Paragraph II F(5) of this order.

P. Failing to orally instruct any person at the time said person signs any contract for sale, rental or lease of any publication, merchandise, service or combination thereof, pursuant to an oral sales presentation, that a "Price List" is attached to said person's contract.

III

It is further ordered, That respondent Encyclopaedia Britannica, Inc., and its successors and assigns, officers, agents, representatives and employees, directly or indirectly through any

corporation, subsidiary, division, or other device, in connection with the recruitment, training, or orientation of any person to sell, rent, lease or distribute any textbook, encyclopedia, reference or educational material, or any other publication, merchandise or service, in commerce, or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making, distributing or using any training tapes, sales manuals, or any other document, method or device which contains any representation or instruction inconsistent with any provision of Paragraph I or Paragraph II of this order.

IV

It is further ordered, That respondents Encyclopaedia Britannica, Inc. and Britannica Home Library Services, Inc. and their successors and assigns, officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any textbook, encyclopedia, reference or educational material, or any other publication, merchandise or service through the use of any program, plan, method, or device, that provides or purports to provide for the sale or distribution of any of said items to any person at intervals on an approval basis, in commerce, or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, either orally or in writing that:

(1) Any person has the option to receive each publication, merchandise or service, separately and individually, and to accept or reject same, unless such person is allowed in all instances to receive and to purchase or reject each such publication, merchandise or service separately and individually;

(2) any person will not receive any further publication, merchandise or service after he notifies respondents of his

cancellation of any such program, plan or method of sale or distribution, unless such is the fact; or misrepresenting, in any manner, any consequence resulting from any person's cancellation of his participation in any such program, plan, or method of sale or distribution; and

(3) any person incurs no risk or obligation by joining or participating in any such program, plan, or method of sale or distribution; or misrepresenting, in any manner, any condition, right, duty or obligation imposed on any person.

B. Disseminating, or causing the dissemination of, any advertisement which fails to disclose in a clear and conspicuous manner:

(1) A description of the conditions and terms of any such program, plan, or method of sale or distribution, and the duties, risks and obligations of any subscriber thereto; and

(2) a description of each publication, merchandise or service to be offered for sale, the billing charge to be made therefor, the anticipated total number of publications, merchandise or services included in any such program, plan or method of sale or distribution, the number of publications, merchandise or services that will be included in each shipment of such items, and the number of and the intervals between each such shipment.

C. Failing to disclose, clearly and conspicuously, on any return coupon, order form or any other document used for responding to any such program, plan, or method of sale or distribution, the following information:

(1) The anticipated total number of publications, merchandise or services included in any such program, plan, or method of sale or distribution;

(2) the number of publications, merchandise or services that will be included in each shipment of such items; and

(3) the number of and the intervals between each such shipment.

D. Failing to disclose, clearly and conspicuously, in immediate conjunction with any publication, merchandise, service or notice thereof sent to any subscriber, the anticipated date on which respondents will initiate processing of the next shipment of any such item.

E. Failing to provide to any person in conjunction with each notice of any shipment of any publication, merchandise or service, a clear and conspicuous means by which said person may exercise his option or right to cancel said shipment, if such is his right.

V

It is further ordered, That respondents Encyclopaedia Britannica, Inc. and Britannica Home Library Services, Inc. and their successors and assigns, officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary, division or other device, in connection with the collection or attempted collection of any debt allegedly owing to respondents for the purchase or other receipt of any textbook, encyclopedia, reference or educational material, or any other publication, merchandise or service, in commerce, or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, either orally or in writing that:

A. Any letter, notice or other communication which has been prepared, originated or composed by respondents has been prepared, originated or composed by any other person, firm or corporation; and

B. suit will be instituted to recover any delinquent debt, or that any delinquent debt will be transferred to any attorney with instructions to institute suit, or that any other legal step to collect any outstanding debt will be taken, unless a definite date is set forth for such action and such are the facts; or misrepresenting, in any manner respondents' relationship with, or instructions to, any attorney, or the course of action that will be taken by any attorney.

VI

It is further ordered, That respondents, Encyclopaedia Britannica, Inc. and Britannica Home Library Services, Inc., do the following:

A. Deliver, by registered mail, a copy of this order to each of their salesmen, agents, solicitors, independent contractors, or to any person engaged in the promotion, sale or distribution of any of the publications, merchandise or services included in this order, and to any person engaged by respondents to perform such duties in the future at the time such person is so engaged;

B. Obtain from each person described in Paragraph VI(A) a signed statement setting forth his intention to conform his business practices to the requirements of this order; retain said statement during the period of three (3) years thereafter; and make said statement available to the Commission's staff for inspection and copying upon reasonable notice;

C. advise each such present and future salesman, agent, solicitor, independent contractor or any person engaged in the promotion, sale or distribution of any of the publications, merchandise or services included in this order that respondents will terminate the engagement or services of any such person, unless such person agrees to and does furnish to respondents a statement required by Paragraph VI(B), above; and

D. if any such person will not agree to file a statement with respondents as required by Paragraph VI(B) above and be bound by the provisions of this order, the respondents shall immediately terminate the services of such person.

VII

It is further ordered, That the respondents shall forthwith distribute a copy of this order to each of their operating divisions.

VIII

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in any of the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of which may affect compliance obligations arising out of this order.

IX

It is further ordered, That respondents shall, within sixty (60) days after the effective date of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

APPENDIX A

NOTICE

Attached hereto are the *pertinent provisions* of a cease and desist order entered against Encyclopaedia Britannica by the Federal Trade Commission, an agency of the Federal Government. Violation of any provision of this Order can result in severe monetary penalties to Encyclopaedia Britannica. If you are employed by Encyclopaedia Britannica, you will be *required* to observe the provisions of this Order. Violation of any provision of this Order by an employee constitutes a violation of a Federal law.

You should carefully read this Order before agreeing to any employment arranged with Encyclopaedia Britannica.

[*President*]
Encyclopaedia Britannica

INITIAL DECISION BY ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

December 16, 1974

Preliminary Statement

[1] Respondents Encyclopaedia Britannica, Inc. (hereinafter referred to as "EB"), a corporation, and Britannica Home Library Services, Inc. (hereinafter referred to as "BHLS"), a corporation, are charged with violation of Section 5 of the Federal Trade Commission Act, as amended (15 U. S. C. § 45).

The complaint, issued by the Commission on December 11, 1972, has three parts. Count I alleges that respondent EB, in connection with recruiting persons for door-to-door [2] solicitation of sales of its products, has falsely represented, directly or by implication, through statements and representations in advertisements in various publications of general circulation and through oral statements of its representatives or agents that it is (1) offering positions in non-selling fields, (2) offering to hire persons as management trainees or in other positions concerned principally with administrative office functions, (3) offering monthly incomes in excess of $500 per month, and (4) offering positions that involve contacting persons in their homes primarily for non-selling purposes. In truth and in fact, the complaint alleges, EB is (1) recruiting persons principally as salesmen in the door-to-door sales of respondent's products; (2) persons are not hired by respondent specifically for training in how to assume administrative functions, but are hired to sell; (3) conditions and limitations imposed by respondent upon the receipt of stated incomes result in few, if any, persons being paid the represented incomes; and (4) persons hired by respondent do not contact persons in their homes primarily for the purposes represented by respondent, but for the purpose of solicitation of sales of respondent's products.

The complaint further alleges that EB, for the purpose of inducing persons to purchase its publications, merchandise and services, utilizes various forms of promotional materials in conjunction with oral representations which represent that (1) EB's salesmen are contacting persons in their homes for non-selling purposes; (2) EB is offering items without cost to persons agreeing to do certain acts; (3) persons who purchase respondent's publications will realize significant savings from the stated prices at which substantial sales of said products have been made by respondent to the general public; (4) EB's representatives will take only a few minutes to complete their presentations inside prospects' homes or places of business; (5) persons subscribing to respondent's Library Research Service can obtain answers to questions regarding any subject; and (6) answers provided by respondent's Library Research Service are the product of detailed, exhaustive or original research generated by the specific questions asked by the subscribers to said service. In truth and in fact, the complaint alleges, (1) the principal purpose for respondent's sales representatives contacting persons in their homes is to sell respondent's products; (2) respondent is not offering certain of its [3] publications or services without cost; (3) persons who purchase respondent's products will not realize substantial savings from claimed resale prices; (4) respondent's sales representatives frequently take several hours to complete their presentations in the homes of prospects; (5) persons subscribing to respondent's Library Research Service do not receive answers to questions regarding all subjects, as respondent imposes many conditions and limitations which are not disclosed; and (6) in most instances, answers provided by respondent are form responses and not the product of detailed, exhaustive and original research generated by the specific questions asked by subscribers.

The complaint further alleges that EB has conducted various contests and utilized other promotional devices for the purpose of obtaining leads to persons who will be contacted by respond-

ent's salesmen, but that respondent fails to inform such persons of the material fact that, as a result of responding to such contests and promotional devices, they will be subjected to a lengthy sales presentation for respondent's products.

Count II of the complaint alleges that BHLS, in connection with the offering for sale and the sale of continuity book programs, has represented, directly or by implication, through statements and representations in advertisements placed in various publications of general circulation and in promotional materials mailed to members of the general public, that subscribers to said continuity book programs are accorded the option of receiving and accepting a single book at a time until the expiration of the continuity programs and that persons who subscribe to said continuity programs do so without risk or obligation. In truth and in fact, the complaint alleges, subscribers to respondents' continuity program are not accorded the option of receiving on approval each book separately. Further, EB and BHLS do not clearly and conspicuously disclose that all but the first few books will be shipped by means of single-bulk shipments and that subscribers to EB and BHLS continuity programs are subject to certain risks or obligations, such as to notify respondents to prevent shipment of additional books, to return to respondents all books found unacceptable, and to pay for all books not returned to respondents.

[4] The complaint also alleges that the failure of EB and BHLS to adequately advise subscribers of the material fact that the subscribers will receive all but the first few books by single-bulk shipments unfairly places an undue burden on subscribers to affirmatively notify respondents in order to prevent shipment of books not expressly and knowingly authorized by said subscribers, and that such subscribers are subject to repeated and unrelenting mailings of bills and dunning letters for unwanted and unordered merchandise which, in many instances, has been previously returned to respondents.

The complaint further alleges that EB and BHLS, for the purpose of collecting debts allegedly due and owing to EB and BHLS pursuant to contracts relating to the purchase of EB and BHLS products, have attempted to induce payment of accounts by sending dunning letters and notices which falsely represent, directly or by implication, that said letters and notices on the letterheads of attorneys are prepared and mailed by those individuals, and that EB and BHLS regularly transfer accounts to attorneys with instructions to institute suit or take other legal measures to collect an alleged outstanding debt. In truth and in fact, the complaint alleges, the letters and notices on letterheads of attorneys are prepared and mailed by EB and BHLS, and respondents do not regularly transfer accounts to attorneys to institute suits or to take legal action to collect allegedly outstanding debts.

Under Count III, the above statements and representations and the failure to disclose material facts are alleged to have the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, or into the purchase or retention of, and payments for, substantial quantities of said publications, merchandise, and services by reason of said erroneous and mistaken belief. The said practices are alleged to be to the prejudice and injury of the public and of respondents' competitors, and to constitute unfair methods of competition or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

[5] Respondents filed their answer to the complaint on February 9, 1973, which contained certain admissions, but generally denied that any of their acts and practices are in violation of the Federal Trade Commission Act.

Thereafter, on October 15, 1973, respondents were granted leave to amend their answer, and on October 23, 1973, EB and BHLS amended their answer, denying that the matters complained of in Paragraphs 5 and 6 of the complaint are matters of

which the Federal Trade Commission has jurisdiction under Section 5 of the Federal Trade Commission Act.

On October 17, 1973, the administrative law judge certified to the Commission respondents' request for a suspension of the adjudicatory hearings pending a ruling by the Commission on respondents' petition to the Commission for the initiation of a trade regulation rule-making proceeding governing the business practices of companies engaged in the in-home sales of encyclopaedia and other educational materials. On October 26, 1973, the Commission denied respondents' request for a suspension of hearings.

After various pretrial proceedings, hearings for complaint counsel's case-in-chief were held on the following dates: November 1-2, 1973 (Washington, D. C.); November 6-9, 12-15, 1973 (Chicago, Illinois); December 4-6, 1973 (Kansas City, Missouri); December 10, 1973 (Denver, Colorado); January 21-24, 1974 (New York, New York); and February 13-15, 1974 (Washington, D. C.). Complaint counsel completed their case-in-chief on April 1, 1974 in Chicago, Illinois. On the same day, EB and BHLS commenced defense hearings which were held on April 1-5, 1974 in Chicago, Illinois, and on April 16, 1974 in Washington, D. C. Complaint counsel did not present evidence in rebuttal. The record for the reception of evidence was closed by order dated May 29, 1974.

Complaint counsel called 84 witnesses who can be categorized as follows: 25 ex-salesmen; 47 consumers or purchasers of respondents' products; and 12 company officials and employees. Respondents called 12 witnesses who were company officials. There were 27 days of formal hearings, and over 1,000 exhibits, many multipaged, received in evidence during the hearings.

[6] After several extensions of time, proposed findings of fact and supporting memoranda were filed by the parties on August 21, 1974, and reply briefs were filed on October 18, 1974.

This proceeding is before the undersigned upon the complaint, answers, testimony and other evidence of record, proposed findings of fact, conclusions and supporting memoranda filed by the parties. These submissions have been given careful consideration and, to the extent not adopted by this Initial Decision in the form proposed or in substance, are rejected as not supported by the record or as immaterial. Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this Initial Decision, are hereby denied. The findings of fact made herein are based on a review of the entire record and upon the demeanor of the witnesses who gave testimony in this proceeding.

For the convenience of the parties, the findings of fact made herein include references to the principal supporting evidentiary items in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

References to the record are set forth in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CCPF—Proposed Findings of Fact, Conclusions of Law and Order submitted by Complaint Counsel, followed by the Proposed Finding being referenced.

RPF—Proposed Findings of Fact, Conclusions of Law and Order submitted by Respondents, followed by the Proposed Finding being referenced.

CCB—Brief submitted by Complaint Counsel in support of their Proposed Findings of Fact, Conclusions of Law and Order, followed by the page or pages being referenced.

[7] RM—Post-Hearing Memorandum of Respondents, followed by the page or pages being referenced.

CCRB—Reply Brief submitted by Complaint Counsel, followed by the page or pages being referenced.

RRF—Reply of Respondents to Complaint Counsel's Proposed Findings of Fact, followed by the page or pages being referenced.

RRM—Reply Memorandum of Respondents In Opposition to the Post-Hearing Memorandum of Complaint Counsel, followed by the page or pages being referenced.

CX—Commission's Exhibit, followed by the number of the exhibit being referenced.

RX—Respondents' Exhibit, followed by the number of the exhibit being referenced.

References to the official transcript are by witness' name whose testimony is being referenced, followed by the page number or numbers of the official transcript.

FINDINGS OF FACT

I. Identity and Business of Respondents

1. Respondent Encyclopaedia Britannica, Inc. (hereinafter referred to as "EB") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at 425 North Michigan Ave., Chicago, Illinois (Complaint and Answer, Par. 1). Through its various organizational divisions and wholly-owned subsidiary, Britannica Home Library Services, Inc., EB publishes, sells and distributes, throughout the world, textbooks, encyclopedias, reference and educational materials, training courses, and other literary works and services. Its volume of business has been, and is, substantial (Complaint and Answer, Par. 1).

[8] 2. Respondent Britannica Home Library Services, Inc. (hereinafter referred to as "BHLS") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 425 North Michigan Ave., Chicago, Illinois. It is a wholly-owned subsidiary of respondent Encyclopaedia Britannica, Inc., and sells and distributes books and other merchandise

through advertising and mailings. Its volume of business has been, and is, substantial (Complaint and Answer, Par. 2).

3. EB dominates and controls, and furnishes the means, instrumentalities, services and facilities for BHLS (Complaint and Answer, Par. 4).

4. In the course and conduct of their businesses, as aforesaid, respondents now cause, and for some time last past have caused, said products to be shipped and distributed from their places of business or their sources of supply to purchasers and prospective purchasers thereof located in various States of the United States other than the State of origination, distribution or storage of said products. Respondents disseminate, transmit and receive, and have caused to be disseminated, transmitted and received, sales promotional materials, invoices, checks, collection notices and various other commercial papers or documents in the course of advertising, selling, distributing, and collecting payment for said products among and between the several States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in such books and other products or services in commerce, as "commerce" is defined in the Federal Trade Commission Act (Complaint and Answer, Par. 3).

5. EB operates through three sales divisions which are not separate legal entities, but part of the corporate structure. Each division recruits and trains its own sales forces, has its own advertising and marketing departments, and is primarily responsible for the marketing of its specific publications, merchandise and services (RX 155C). The principal products and services of these sales divisions are:

Encyclopaedia Britannica Sales Division

Encyclopaedia Britannica

Britannica Junior Encyclopaedia

[9] Britannica/Merriam Webster World Language Dictionary

Britannica World Atlas

The Annals of America

Britannica Pre-School Library

Young Children's Encyclopaedia

Britannica Bookcase

3-volume replica of original set

World Globe

Bible

Library Research Service

Great Books Sales Division

Great Books of the Western World

Gateway to the Great Books

Great Books Reading Plans

The Annals of America

Britannica/Merriam Webster World Language Dictionary

Bookcase

Bible

Library Research Service

Educational Fund Awards Program

Reading Dimensions Program

Family Participation Plan

Compton's Encyclopedia Sales Division

Compton's Encyclopedia

Young Children's Precyclopedia

Dictionary

Atlas

Table Rack/Bookstand

Compton World Globe

Library Research Service (RX 155C.)

The Great Books Sales Division was abolished in approximately 1971 and its sales personnel were assigned to work under the supervision of the Encyclopedia Sales Division (RX 155; Baseman, Tr. 2827; Swanson, Tr. 3522). Compton's Encyclopedia in recent years has been sold by BHLS by mail (RX 155; Swanson, Tr. 3522; Harden, Tr. 3616-18).

[10] 6. EB is essentially a direct selling organization; it makes the most substantial portion of its sales in the home (RX 155C). EB's sales in the home are door-to-door sales, as that term is defined in the Commission's *Trade Regulation Rule Concerning a Cooling-Off Period for Door-To-Door Sales.* The Commission defines a "door-to-door sale" as "A sale * * * in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller" (16 C. F. R. § 429.1; Promulgated October 18, 1972; effective June 7, 1974). BHLS, the EB subsidiary, is engaged exclusively in the mail order business throughout the United States (RX 155C, D).

7. EB has reported more than $70 million annually in gross domestic sales (RX 155H). The Encyclopaedia Britannica Sales Division of EB maintains a sales force of approximately 2,000 salesmen (Swanson, Tr. 3521), who are assigned to 21 divisions throughout the country (CX 379-400).

II. Recruiting Practices

A. *Dissemination of Recruiting Advertisements*

8. In the regular course and conduct of its business, and for the purpose, among others, of recruiting personnel for solicita-

tion of sales of its products door-to-door, local offices of EB have disseminated, and have caused to be disseminated, advertisements in various publications of general circulation (Complaint and Answer, Par. 5). Prior to their dissemination and publication, the advertisements are approved by EB's legal department and corporate officers for use by EB's local offices (CX 5D-E; Holmes, Tr. 3121; Martinez, Tr. 3167-68; Sollo, Tr. 3043; Balzano, Tr. 1516). Hiring Ad Catalogs are disseminated to "ALL DIVISION AND DISTRICT MANAGERS" (CX 5-D) to be used as an "absolute guide" in determining which advertisements may be published by the local offices of EB for the purpose of recruiting salesmen (Sollo, Tr. 3076-77; *cf.* Balzano, Tr. 1516). CX 5 is the *Hiring Ad Catalog* that was issued by EB on August 1, 1970. CX 405 is a hiring ad guide for EB's Compton's division.

[11] 9. Through its local offices, EB has placed recruiting advertisements in such highly circulated newspapers as the *New York Times, Boston Globe, Washington Post, Chicago Tribune, St. Louis Post-Dispatch, Denver Post, Los Angeles Times, Detroit Free Press,* and *Philadelphia Inquirer* (*see* CX 7-357; Van Allen, Tr. 628; Holmes, Tr. 3120). CX 5, the *Hiring Ad Catalog* for the Encyclopaedia Britannica Sales Division, covering February 1, 1970 through August 1, 1970, demonstrates that there were several thousand "inquiries" in response to the recruiting advertisements used in the period January-June 1970 (*see* Sollo, Tr. 3031; Joy, Tr. 2950; Baseman, Tr. 2814-15). EB has a high "turnover rate" in sales personnel (Davis, Tr. 3462-64), so that recruitment of sales personnel is an important aspect of sales promotion (Cohan, Tr. 3431).

B. *Types of Advertisements Utilized*

(1) Blind Advertisements

10. Blind recruiting advertisements are advertisements which fail to disclose (1) the type of job position being offered; (2)

the corporate identity of the firm which has placed the ad; or, (3) the product/service for which the applicant is expected to have responsibilities (Galvez, Tr. 3256; Davis, Tr. 3464). Numerous examples of "blind" advertisements are in the record (CX 5G-H, 5-Z-7, 5-Z-22, 5-Z-44; *see also,* CX 5-I-Q, 5-V, 5-X, 5-Z-(3-4), 5-Z-(8-9), 5-Z-(11-14), 5-Z-(23-25), 5-Z-(33-35), 5-Z-48, 5-Z-52, 5-Z-(57-58), 5-Z-71, 5-Z-(72-74), 366C-E, 1840). EB places some such blind ads in sections of the newspaper other than "Salesmen-Wanted" columns (CX 28, 34-42, 47-48, 59, 81, 85, 113, 115, 118-120, 245, 304-306, 308, 352). CX 28 was placed in the "Display" column of the newspaper and has the words "Guidance Materials" in the upper right corner of the advertisement. CX 41 is an advertisement for "Management Trainees" which was placed in the "Male Help" column of the newspaper.

11. It is EB's corporate policy generally not to disclose in its recruiting advertisements either the company name, the identity of its products and services, or the nature of the job position being offered. EB has determined that the use of blind recruiting advertisements is "vital to the conduct of the business" (Balzano, Tr. 1543; *accord,* Davis, Tr. 3464-65). "The blind advertisement [12] was the one that was used to a greater extent * * * so the managers would have the opportunity of interviewing the greatest number of people who were seeking employment" (Bergstrom, Tr. 1470). "Most of the salesmen were recruited as a result of those blind ads. * * * But the bulk, the large majority of our people were recruited through the blind ads" (Holmes, Tr. 3122; *see also,* Van Allen, Tr. 627-628; Heinzman, Tr. 925; Burgoyne, Tr. 1072; Bergstrom, Tr. 1468-69; Balzano, Tr. 1515-17; Tafolla, Tr. 1716-17; Eastaugh, Tr. 2247; Lang, Tr. 2328; Clauss, Tr. 2347-2350; Caine, Tr. 2462-63; Baseman, Tr. 2825; Holmes, Tr. 3121-22; Martinez, Tr. 3168; Galvez, Tr. 3256; Gregg, Tr. 3358-3360; Cohan, Tr. 3432; Davis, Tr. 3452, 3464-65; *accord,* CX 405; *see* Bresnik, Tr. 411).

12. Various corporate witnesses testified about why EB utilizes blind ads:

> * * * there would be a greater selection of the type of people that we would interview (Martinez, Tr. 3168).
>
> * * * * *
>
> A. * * * We found that running open ads wasn't too successful because the popular misconception was that people who sold encyclopaedias went around knocking on doors (Cohan, Tr. 3432).
>
> * * * * *
>
> A. * * * Experience had taught our managers that you will get a greater number of people or prospects to interview through a blind ad by the very nature of the fact that most people do not consider themselves as sales types, and if you said you wanted a sales person they will say, "This rules me out because I have either had no experience or I would be no good at it" (Bergstrom, Tr. 1470).
>
> * * * * *
>
> Q. Why did you run blind ads?
>
> [13] A. * * * we didn't want anything to detract or detract these people from answering our ads (Holmes, Tr. 3122-23).

Respondents acknowledge that blind advertisements make it possible for Britannica to attract and recruit persons who do not think of themselves as potential Britannica sales representatives (RPF II 1).

13. EB's Weekly Hiring and Training Reports show the extent to which EB's *blind* ads result in generating "inquiries," "interviews" and persons "entering training" (see, *e.g.*, CX 14 [23 inquiries, 7 interviews, 2 entering training]; CX 81 [57 inquiries, 14 interviews, 2 entering training]; CX 87 [82 inquires, 14 interviews, 2 entering training]; CX 116 [37 inquiries, 6 interviews, 2 entering training]; CX 221 [112 inquiries, 46 interviews, 7 entering training]; CX 222 [49 inquiries, 6 interviews, 3 entering training]; CX 334 [37 inquiries, 6 interviews, 2 entering training]).

14. EB's Weekly Hiring and Training Reports also show the extent to which EB's *open* ads result in generating "inquiries," "interviews" and persons "entering training" (see, *e.g.*, a Dallas Division "open ad" campaign, especially ads which appear on CX 259 [10 inquiries, 5 interviews, 7 entering training]; CX 263 [39 inquiries, 11 interviews, 10 enterng training]; CX 264 [35 inquiries, 18 interviews, 18 entering training]; CX 271 [18 inquiries, 13 interviews, 12 entering training]; CX 272 [18 inquiries, 15 interviews, 8 entering training]; CX 276 [12 inquiries, 8 interviews, 8 entering training]). An EB spokesman testified as to why EB open ads produce a much higher ratio of persons entering training than its blind ads (Bergstrom, Tr. 1470):

> Q. But when you ran open ads would you say your average of persons who in fact were hired for the position was better [than for blind ads]?
>
> A. Yes, it will be. You get far fewer but you will stand a chance of hiring—ratiowise your percentage will be better.

[14] 15. EBs recruiting advertisements have a telephone number which interested persons are to call in order to arrange an interview (CX 5). It is the policy of EB, in responding to telephone inquiries, not to disclose over the telephone the name of the company or that the job involves door-to-door selling. The testimony of an ex-telephone receptionist confirms this policy (Gervasio, Tr. 2170):

> Q. What if any instructions were you given with respect to answering the telephone?
>
> A. When I answered the telephone, I was to answer with the last four digits of the phone number, to never give out the name of the company * * * (*See also,* Gregg, Tr. 3360-61.)

16. When most prospective salesmen arrived for their initial interviews, they were still not told immediately what position was being offered nor the identity of respondent (Gregg, Tr. 3360-

61; Bresnik, Tr. 412; Van Allen, Tr. 630; Eastaugh, Tr. 2229-2231; Cambria, Tr. 2255-56). Employees were directed to conceal the name of "Encyclopaedia Britannica" (Gervasio, Tr. 2172):

> Q. What, if anything, or what, if any instructions were you given about what to say to a person coming to the office responding to a recruiting advertisement?
>
> A. The only thing I would do is give the aptitude test and give it to them to make it out. Other than that no other instructions. If I were sitting in the front office, any material that had Encyclopaedia Britannica on it, I would have to remove it, cover it up, hide it, as long as they did not see the name of the company.
>
> Q. Who told you to do this?
>
> A. The division manager.
>
> Q. What, if any instructions were you given as to what to say to a person who came in to the office asking about what the company is or what type of product was involved?
>
> [15] A. I couldn't give them any information. (*See* Gregg, Tr. 3360-61; Cohan, Tr. 3432; Davis, Tr. 3464-65; Holmes, Tr. 3127-28; Kalstein, Tr. 2003-2004; Bisping, Tr. 709-711; *see also*, Toncrai, Tr. 550-552; Yee, Tr. 987; Cambria, Tr. 2256-59).

17. In recruiting advertisements, in telephone responses to such advertisements, and at initial interviews with job applicants, EB has failed to disclose the following material facts:

(a) The position being offered is in door-to-door selling;

(b) the position is being offered by EB; and

(c) the products to be sold are encyclopedia and other reference materials.

(2) Advertisements Representing Positions Other Than Door-To-Door Selling

18. EB utilizes some recruiting advertisements which represent that the position being offered does concern "sales"; however, such ads fail to disclose either EB's corporate identity or its product. EB's purpose in using such blind ads is that it does not desire to disclose that the position being offered is door-to-door sales of encyclopedias. Thus, EB is able to recruit persons who would not otherwise have responded to its ads (RPF II 1; Balzano, Tr. 1543; Holmes, Tr. 3123; Martinez, Tr. 3168-3169; Davis, Tr. 3463-65; see, *e.g.*, CX 5-O, 5-U, 5-Z-1, 5-Z-10, 5-Z-(26-27), 5-Z-38, 5-Z-45, 5-Z-(49-51), 5-Z-(61-63), 5-Z-71). While some recruiting advertisements disclose its corporate identity, in some such ads EB expressly claims that the position being offered is not in door-to-door selling. The following is one such ad (CX 5-Z-37; *accord*, CX 5-Z-8): [16]

OUR 200TH
ANNIVERSARY

ENCYCLOPAEDIA
BRITANNICA
NEEDS
PARTTIME AND FULL
TIME SALES HELP

NO DOOR TO DOOR
SELLING;—NO
CANVASSING—NO
SOLICITING

* * * * *

CALL

* * * * *

19. EB's August 1, 1970 *Hiring Ad Catalog* contains advertisements stating that respondent is offering positions which include "mgmt., administration, personnel, credit, public relations and sales promotion" (CX 5-Z-20, 5-Z-33, 5-Z-71), and that EB is immediately willing to start training "5 men * * * in advertising and sales promotions division" at "$700 PER MONTH"

(CX 286). EB also places ads in newspapers which represent that it is recruiting persons to train or to work in marketing and sales. These ads carry at their top, in bold print, the term "MARKETING" (CX 5-Z-25, 218, 257, 317). The text of some of these advertisements states that EB is "seeking college grads * * * to enter marketing training. Will guarantee you $725 PER MO." (CX 257). Through the use of such advertising formats, EB is able to recruit as salespersons college students who are marketing majors and are looking for positions in the field of marketing (Bresnik, Tr. 411). EB has run ads entitled "Marketing Sales" (CX 992), and has placed them in the marketing sales section of the classified ads of newspapers (Eastaugh, Tr. 2248-49). EB also represents that it is offering job positions in the field of "sales promotion" (CX 5-U, 217; *see also,* CX 286), and as an instructor (CX 5-Z-12) or demonstrator (CX 5-Z-13). This latter approach is used to attract persons with the professional qualifications of teachers to demonstrate educational aids (CX 405-I). Some of the ads which EB employs represent that the job being offered requires operating at an executive level (CX 5-N). Other advertisements represent the products involved to be "research [17] service products" (CX 1506). Some of EB's ads represent that it is recruiting persons to deliver free advertising information to families in their homes; for example:

> To all the families who have sent for information from us free. We just do not have enough * * * representatives to deliver the information you have requested.
>
> * * * * *
>
> REPRESENTATIVES URGENTLY NEEDED * * * (CX 5-Z-59).

Other ads represent that respondent is recruiting persons to survey families in their homes; for example:

> COLLEGE STUDENTS Needed to interview families in this area * * * GREAT IDEAS PROGRAM * * * (CX 330).

20. Once persons have been recruited as salesmen, EB "trains such persons on how to sell and sends them out to sell" (Respondents' Answer, Par. 6(2)). These persons are trained to make door-to-door sales of EB's products. This is illustrated by the testimony of EB's New York Divisional Manager, Mr. Cohan (Tr. 3440):

> Q. * * * What kind of training do people receive who respond to blind [recruiting] ads?
>
> A. Well, basically we only had one kind of training. Since all the people that I hired were hired to be sales representatives in my district, they received our standard training which equipped them to go out into the field, make a standard presentation, close the sale the way it was supposed to be closed and, hopefully, write the order. (*Accord,* Sollo, Tr. 3035, 3065; Joy, Tr. 2963-64, 2993-95; Baseman, Tr. 2815-16; Holmes, Tr. 3122-24; [18] Martinez, Tr. 3168-69; Gregg, Tr. 3365-66; Davis, Tr. 3470-72; Galvez, Tr. 3256-57; Balzano, Tr. 1515-16; Bresnik, Tr. 415; Kalstein, Tr. 2000-2008; Laferriere, Tr. 2102-2110; Eastaugh, Tr. 2228-2233.)

Respondent contends that it is not engaged in door-to-door selling; that EB is a *lead* organization whose salesmen do not canvas door-to-door but instead follow "leads" or inquiries from prospective customers (RPF II 5; RRF, p. 3). All the evidence confirms, however, that EB is primarily engaged in the door-to-door sale of its publications, merchandise or services, and that it recruits hundreds of persons each year to transact these sales (RX 155; Davis; Tr. 3462-63). Also, salesmen do engage in door-to-door canvassing, or "cold canvassing" (Findings 34, 40, *infra*). Substantial reliance upon so-called "leads" does not remove EB's sales activities from what is known as door-to-door sales (Finding 6, *supra*). Thus, EB is not offering positions in the fields represented. To the contrary, EB is recruiting persons, principally, as salesmen in the door-to-door sale of respondent's publications, merchandise or services.

(3) Advertisements Representing Management Training

21. The following are typical and illustrative of EB's management trainee hiring ads:

SAVE ME!!

My company just promoted 3 of my key men to management positions after only 4 months and now I'm going out of my mind trying to find 3 good men to fill the holes in my organization. These men should want a very good income, an excellent future and management training. If you meet our requirements we will guarantee you up to: PER $625 MONTH.

Houston * * * Call * * * (CX 5-H; *cf.* Martinez, Tr. 3199.)

* * * * *

[19] Managers WE PROMOTE $25,000 & up Potential

We are looking to train experienced salesmen & sales managers. For new management openings in our growing $170 million company.

Salary & guarantee arrangements. Full company benefits. Complete training program 9 assignments in Los Angeles. * * * (CX 5-J; *cf.*, CX 391.)

* * * * *

MANAGEMENT TRAINEE
INTERNATIONAL CONCERN

Up to $1000 per month Guaranteed if you meet our requirements.

First years earnings to 20M * * * call * * * (CX 5-V.)

* * * * *

EXECUTIVE SALES TRAINEE
$800 Month guarantee

Must meet company requirements. We need several qualified persons to enter our executive training program. You will receive 90 days of extensive training.

Must be over 21, good car & able to start training immediately.

* * * call * * * (CX 5-W.) [20]

* * * * *

MANAGEMENT TRAINEE $675 monthly guarantee, if you meet requirements. Call * * * (CX 35; *see also,* CX 37, 38, 41.)

Other management trainee advertisements included in the record are CX 5-I, 5-N, 5-O, 5-Q, 5-X, 34-35, 41-48, 99, 106, 114-115, 118-120, 304-306, 308, 352-353. CX 5-U is an "EXECUTIVE SALES TRAINEE" advertisement.

22. EB employs management trainee type ads to recruit persons for the door-to-door sale of its products (*see* Sollo, Tr. 3065-67). A number of ex-salesmen testified about EB's use of such ads (Kalstein, Tr. 2001-2005; Badger, Tr. 2180-82; *see also,* Gervasio, Tr. 2171). Persons who have had selling experience and who think in terms of leaving their current positions to step up into management are attracted by EB's promise of management opportunities (Heinzman, Tr. 926-927, 943; Kalstein, Tr. 2000-2005; Badger, Tr. 2179-2180, 2185; *accord,* Sollo, Tr. 3066-67). Seventy-two (72) persons responded to EB's "SAVE ME!!" advertisement set out above (CX 5-H), which was run by the Houston division. At the time the ad was run, it was the division manager's practice not to enter into any management trainee agreements (Martinez, Tr. 3199-3200). Sixty-three (63) persons responded to EB's "WE PROMOTE" advertisement set out above (CX 5-J). While the advertisement represented that there were "9 assignments" open in management, the Los Angeles division maintained only 10 districts at the time, and only 4 such manager's positions were open (CX 391).

23. Some operating divisions place heavy reliance upon the use of management trainee ads to recruit door-to-door salesmen. In the Hartford division, in the course of one month, 45 out of

83 persons accepted into sales training were recruited through management trainee ads (CX 33-48). The Hartford division maintained only 6 district manager positions at the time, and three (3) of those were filled (CX 387).

24. It is EB's policy to hire everybody, initially, as a door-to-door salesman, and to develop managers from within the ranks of its own salesmen (Holmes, Tr. 3134-3135; Sollo, Tr. 3057, 3064-67 3076; Baseman, Tr. 2825-26; [21] Martinez, Tr. 3179; Galvez, Tr. 3266-67; Gregg, Tr. 3365-3366; Cohan, Tr. 3440-3442). EB does not maintain a management training program as such (Bresnik, Tr. 509; Toncrai, Tr. 589; Tafolla, Tr. 1725, 1728; Kalstein, Tr. 2005-2006; Peterson, Tr. 2070; Badger, Tr. 2185; Gaboury, Tr. 2315), and it rarely enters into management trainee contracts, such as CX 436 (*see* Martinez, Tr. 3199-3200; Kalstein, Tr. 2000; Badger, Tr. 2180, 2185; Gaboury, Tr. 2301; Joy, Tr. 3007-3018; Gregg, Tr. 3382-83). EB officials testified that persons who sign management trainee contracts (see CX 436) go through the identical training as persons who sign sales representative contracts (see CX 416 and 417):

> A. * * * but ultimately he would have gone through the entire training program that we would give any salesman (Joy, Tr. 2994).
>
> * * * * *
>
> A. I started as a manager in training, which meant starting as a salesman (Holmes, Tr. 3116).
>
> * * * * *
>
> THE WITNESS: Again I remind you the managers are salesmen and are certainly to begin with (Sollo, Tr. 3076).

EB officials testified that persons who sign management trainee contracts are expected to spend upwards of six months in the role of salesman (Sollo, Tr. 3057, 3065; Gregg, Tr. 3382-83; Joy, Tr. 3017-18; Cohan, Tr. 3430), and that such persons are promoted to management positions on the same basis as

persons who sign sales representative agreements (Sollo, Tr. 3066; *accord,* Joy, Tr. 3006):

> Q. A person responding to a salesman ad who demonstrates that same ability that you are looking for in a person responding to a management trainee ad has an equal opportunity to become a manager trainee or manager, is that true?
>
> A. Yes * * *.

[22] Managers are assigned duties and responsibilities far more extensive than those exercised by salesmen (Holmes, Tr. 3118; Galvez, Tr. 3256; Cohan, Tr. 3431). EB does not begin to train persons in these activities until they are promoted to district field trainer some four to six months after they have been employed exclusively as a salesman (Holmes, Tr. 3135; Galvez, Tr. 3253; Kalstein, Tr. 2036). Thus, EB does not hire persons for management trainee programs; rather, persons are hired by EB as door-to-door salesmen for its products and services.

(4) Advertisements Representing Guaranteed Income

25. EB makes substantial use of recruiting advertisements which offer guaranteed incomes ranging from $500 to $1,000 per month. All such ads specify that the guaranteed income is offered "if you meet our requirements." No further details are set forth in the ads, and the ads do not place any time limitations upon the monthly incomes represented therein (see CX 5: *e.g.*, CX 5-F, 5-S, 5-U, 5-Z-1, 1506). Several former salesmen testified that they were most attracted to EB by the high incomes promised in the recruiting ads (Heinzman, Tr. 925, 927, 939, 943 [responded to an ad guaranteeing $1,000 per month]; Gaboury, Tr. 2304-2305 [responded to an ad guaranteeing $850 per month]; Abernathy, Tr. 770-773; Jackola, Tr. 884; Van Allen, Tr. 630; Yee, Tr. 985-986; Burgoyne, Tr. 1073).

26. At the initial interviews with prospective salesmen, EB represents that it will be "easy" to earn incomes in excess of

those stated in the ads and at the interviews, and thus discourages use of the guarantee contract (Van Allen, Tr. 632; Abernathy, Tr. 772; Heinzman, Tr. 927, 939; Badger, Tr. 2219; Barad, Tr. 1991; Cambria, Tr. 2262-65; Gaboury, Tr. 2313-14). EB does, in fact, hire some salesmen on the "guarantee contract" (Galvez, Tr. 3258; Heinzman [$1,000 per month], Tr. 925 and CX 1343-J; Clauss, Tr. 2354 [$800 per month], CX 1506; Toncrai, Tr. 554; Van Allen, Tr. 657; Eastaugh, Tr. 2242 and CX 994; Lang, Tr. 2333-35). EB's contract form limits the guarantee to a *one* month period (CX 417; *see also,* Eastaugh, Tr. 2242 [CX 994]; RX 262E-H; *but see,* Martinez, Tr. 3171, 3197-98). [23]

C. *Earnings Guarantees Are Not Reasonably Feasible*

(1) Salesmen Were Not Paid Guaranteed Income

27. None of the 25 former salesmen called to testify by complaint counsel received "monthly incomes" at or above the rate represented to them by EB (Toncrai, Tr. 553-557 [signed a guarantee contract promising $600 per month, worked one month and received nothing]; Lang, Tr. 2333-35 [signed a guarantee contract promising $500 per month, worked one month and received nothing]; Bisping, Tr. 712-715 [signed a guarantee contract calling for $800 per month and was paid $100]; Heinzman, Tr. 943 [signed a guarantee contract promising $1,000 per month (CX 1343-J), worked 2-3 months and received a total of $440]; Cambria, Tr. 711-712, 715 [signed a guarantee contract promising $800 per month, worked one month and received $100]; Badger, Tr. 2180-82, 2185, 2212, 2217 [was assured of at least $800 per month, worked 2-3 months and received a total of about $200]; Clauss, Tr. 2349, 2353-54, 2371 [worked approximately six weeks and received about $400]).

28. Respondents' failure to honor guarantee contracts is further illustrated by the testimony of Mr. Eastaugh, a former salesman (Tr. 2242-43):

Q. Mr. Eastaugh, how many presentations did you make during the period covered by the guaranteed contract?

A. Seventy-three.

JUDGE BARNES: Did you receive $125 a week during the guaranteed contract?

THE WITNESS: No.

* * * * *

JUDGE BARNES: What were you told in regard to your commission [guarantee] contract, Mr. Eastaugh?

[24] THE WITNESS: I was told that we would get the lump sum of $500 for four weeks. At the end of the period * * * after we passed in sixty or more computer [rejection] cards * * * and at the end of the four weeks [the divisional manager] informed me that he has never paid on a contract that he would have to verify everyone of these presentations, but he assumed from past experience that it would take two to three months to verify them and that there would be less than sixty valid presentations. Therefore, I probably wouldn't get paid on the contract.

JUDGE BARNES: Did you ever get paid on the contract?

THE WITNESS: No * * *.

29. In contrast, respondent presented evidence that five (5) salesmen had received incomes pursuant to guarantee contracts (RX 262). All of these salesmen were employed by EB subsequent to the initiation of the Commission's investigation which commenced prior to November 1970 and continued throughout 1971 (RX 155; CX 4). One of EB's district managers testified that, of the more than 100 salesmen he hired on a guarantee basis, only one was paid the difference between the guarantee and the commissions earned (Galvez, Tr. 3258, 3268-69). This salesman was one of the five (5) listed by EB as receiving the guaranteed income.

(2) Economic Deterrents

30. It is the responsibility of the divisional, district and branch managers to pay the guaranteed income to salesmen who have signed guarantee contracts (Joy, Tr. 2942-44; Sollo, Tr. 3052; CX 421-A, 418, 419, 420, 442, 441, 443, 423, 440). Thus, if the recruited salesman fails to earn in commissions the full amount of the guaranteed salary, the branch, district or divisional manager would be responsible for paying the difference. The effect of this policy is illustrated by the testimony of an EB ex-field trainer (Laferriere, Tr. 2133-34):

> [25] Q. Mr. Laferriere, during your current activities did you compose recruiting ads guaranteeing a certain income?
>
> A. * * * During the very first we used the 600 [dollars] guarantee ads, but when the people came in and asked for the guarantee, we immediately discouraged it, because first of all [the District Manager] was aware that this could be deducted from the sales, and if the salesman was on a commission basis, we were subject to his overrides. (*See also,* Abernathy, Tr. 772; Heinzman, Tr. 939; Burgoyne, Tr. 1075; Barad, Tr. 1966, 1991; Kalstein, Tr. 2006; Badger, Tr. 2182; Cambria, Tr. 2261-63.)

(3) Required Number Of Full Presentations

31. Salesmen who accept EB's offer of a "guaranteed income" sign agreements similar to CX 417, in addition to EB's standard Representative Agreement—CX 416. Salesmen who sign the guarantee contract therefore agree to meet certain performance standards in order to earn the guaranteed income. Many persons who sign the guarantee contract commit themselves to making sixty (60) "standard presentations" within a month's time (Bisping, Tr. 711; D. O.'Brien, Tr. 880; Barad, Tr. 1969; Laferriere, Tr. 2111; Eastaugh, Tr. 2242; Cambria, Tr. 2264; Lang, Tr. 2333). Other persons committed themselves to at least 45 such presentations per month (Bresnik, Tr. 505; Toncrai, Tr. 554; Van Allen, Tr. 657; Burgoyne, Tr. 1077; Peterson, Tr. 2043). A "standard presentation" is defined as (CX 417):

> * * * one which is given in the presence of both husband and wife; that conforms to the presentation which you were trained to give; that concludes with a conscientious effort on your part to obtain an order; and is given only in the area assigned to you. Presentations made to relatives, friends, etc., will not be counted. It is also required that you turn in a full report of your activities daily on each presentation to your Manager * * * and [26] that you attend all training sessions and sales meetings during the initial 30-day training span.

A former district field trainer with eight months' selling experience testified (Bresnik, Tr. 505):

> The number of presentations [45] that were required for you to make was, I'd say, almost impossible, especially for a new trainee to meet during his initial 30-day period.

(4) Non-Availability Of Qualified Leads

32. Before a salesman can make either a sale or presentation, he must first establish contact with a "prospect." Respondent places emphasis on making contact with prospects through the use of qualified leads rather than by approaching persons at their homes without any prior appointment or expressed interest in the purchase of its products by the prospect (Holmes, Tr. 3123, 3128-29; Martinez, Tr. 3176-3177; Gregg, Tr. 3367; Davis, Tr. 3472). EB claims that it has an abundance or oversupply of leads for its salesmen to utilize (CX 5-G, 5-Q, 5-S, 5-T; Heinzman, Tr. 928; Burgoyne, Tr. 1073; Badger, Tr. 2182). This claim is also made in EB's indoctrination materials (Van Allen, Tr. 631).

33. Many salesmen found that respondent was unable to supply sufficient numbers of qualified leads to permit them to make the necessary presentations or sales in order to meet the conditions of their guarantee contract (Abernathy, Tr. 794;

Heinzman, Tr. 941; Burgoyne, Tr. 1109-1110; Badger, Tr. 2204, 2208-2209; Van Allen, Tr. 636). Substantial effort must be expended by salesmen in generating their own "local" leads (*see* CX 632, 611, 630; Bresnik, Tr. 488; Toncrai, Tr. 566). The insufficiency of leads poses a particular problem to trainees who have not had the time to develop a "backlog of prospects" which would enable them to maintain a constant source of names to contact for the purpose of attaining the mandatory number of presentations or sales (Bresnik, Tr. 507-508). Further, many of the leads salesmen receive from EB are of poor quality (Van Allen, Tr. 664; Beitch, Tr. 1762; Kalstein, Tr. 2028-2030; Badger, Tr. 2183-84) because: (1) some of the leads [27] which EB sells to its salesmen have contained on them explicit instructions from the "propect" to "have no salesman call" (Heinzman, Tr. 942, 946; Gervasio, Tr. 2167); (2) many of the leads are sent in by persons who are only interested in the various prizes which EB offers as an inducement (Jackola, Tr. 896; Heinzman, Tr. 934; O'Brien, Tr. 1067; Burgoyne, Tr. 1079; Laferriere, Tr. 2127; Badger, Tr. 2182); (3) many of the leads are sent in by "children" with no obvious interest in the purchase of EB products, simply a chance to win a free prize (Bresnik, Tr. 536; Heinzman, Tr. 946; Badger, Tr. 2184); (4) many of the leads are old and have already been worked once before by other salesmen (Kalstein, Tr. 2035; Laferriere, Tr. 2108; Bisping, Tr. 724); (5) many salesmen must rely upon "non-responsive" leads, *i.e.*, where persons so listed have not "expressed" an interest in products which EB salesmen are authorized to sell (*e.g.*, baby leads—listing of persons on directories of newly-borns: Van Allen, Tr. 634; Bisping, Tr. 723; Heinzman, Tr. 946; Yee, Tr. 998; Barad, Tr. 1983-84); or Encyclopaedia Britannica paid-ups—a listing of persons who have already purchased the Encyclopaedia Britannica and are thereafter made available to Great Books salesmen to work (Bresnik, Tr. 437); (6) many leads are to persons who reside in "bad neighborhoods" or who are bad "credit risks" which

adversely affects both the chance of having an order accepted, as well as the size of any commission which might eventually be earned (Laferriere, Tr. 2108; Burgoyne, Tr. 1110); and (7) the better leads are given to the veteran sales staff (Heinzman, Tr. 942; Van Allen, Tr. 673).

(5) Business Expenses

34. EB's standard contract form contains a provision which requires that salesmen absorb a part of EB's business expenses (CX 416-B). A former corporate official in charge of advertising testified that salesmen absorb all the costs of locally developed leads and up to 50 percent of the costs for nationally developed leads (Curtin, Tr. 2833, 2871-72; Bresnik, Tr. 508; Heinzman, Tr. 924; Beitch, Tr. 1762). Salesmen paid 10 cents per "baby lead," *i.e.*, "lists of people who had a baby born just recently or who just moved into the community" (Heinzman, Tr. 946). Due to the nature of the sales operation, salesmen have to also absorb substantial transportation costs (Kalstein, Tr. 2018; Peterson, Tr. 2045; Badger, Tr. 2211). Sales costs often are substantial [28] (Kalstein, Tr. 2035, 2039 [Kalstein's lead costs, alone, amounted to more than $500 on sales earning commissions of less than $1,500 over a three-month time period —RX 140]; Clauss, Tr. 2370; Heinzman, Tr. 946; *cf.* respondent's assurances that such costs will be minimal—CX 606-C, 645-C). Some salesmen resorted to "cold canvassing" as a means of generating enough business to earn the incomes represented by EB (Bresnik, Tr. 488-489; Toncrai, Tr. 538; Bisping, Tr. 723; Heinzman, Tr. 949; Peterson, Tr. 204; *see* CX 632-C where salesmen are encouraged to "call at homes or offices without any form of lead or appointment").

35. In order to make a presentation, a salesman first attempts to set up an appointment with his prospect. To convert leads into appointments, for example, a salesman might have to run down 200 "baby leads" in order to generate just a few presentations (Yee, Tr. 998), or spend 6 hours a day on the

telephone to establish just two appointments (Van Allen, Tr. 659), or make from 10 to 30 calls per day just to set up enough appointments to work one night (Barad, Tr. 1987; Bresnik, Tr. 507; Van Allen, Tr. 659 [salesmen were charged for telephone calls—Van Allen, Tr. 664]), or make as many as 400-500 telephone calls within one month in order to generate just 15 presentations (Clauss, Tr. 2369). Even after the appointment has been made, as many as 3 out of 4 are not subsequently honored at the door (Van Allen, Tr. 659; Laferriere, Tr. 2110).

36. As one of its conditions for "validating" a full presentation, EB requires that both the husband and wife be present throughout the sales presentation (CX 417; Toncrai, Tr. 614). Where only one spouse is available, salesmen are required to reschedule their appointment (Bresnik, Tr. 506; Toncrai, Tr. 557; Abernathy, Tr. 797; O'Brien, Tr. 881; Laferriere, Tr. 2110; CX 417). The testimony of former salesmen shows that the number of appointments a salesman can reasonably make for any given evening is limited (Heinzman, Tr. 941-942; Cambria, Tr. 2270; Abernathy, Tr. 794). The testimony of former salesmen further shows that most salesmen find it extremely difficult for many reasons to make the transition from the door-opener into the sales pitch and ultimately through the full presentation; for example, most recruits lack experience (Bresnik, Tr. 507); salesmen often run into "abusive" customers (D. O'Brien, Tr. 875-876), some people think if they sign an "acceptance card" and [29] fill out all the requested credit information, they are signing a sales contract (Toncrai, Tr. 616); and some people are "afraid" to fill out the "rejection card" which is necessary to prove the salesmen have made a "full" presentation (Toncrai, Tr. 557). If a salesman fails to get either a signed rejection card or acceptance card (Van Allen, Tr. 658; Bisping, Tr. 714; Bresnik, Tr. 436, 461; Toncrai, Tr. 557), or fails to list a prospect's telephone number even when that prospect has no telephone, EB will disqualify the presentation (Toncrai, Tr. 614).

(6) Additional Limitations

37. The testimony of former salesmen shows that many salesmen sign their guarantee contract prior to their training so that they cannot fully appreciate the difficulty of meeting the contract's requirements, and they have less than the promised thirty (30) days in which to meet their contract obligations (Bresnik, Tr. 505-506; D. O'Brien, Tr. 881; Burgoyne, Tr. 1080). Many salesmen are not informed about the additional business expenses which respondent charges them until after they have signed their contract and have been working for a number of weeks (Van Allen, Tr. 663-665; Heinzman, Tr. 943; O'Brien, Tr. 1059; Cambria, Tr. 2270). Other terms and conditions of the guarantee contract are not fully explained at or before the time of their signing (Toncrai, Tr. 557; Bisping, Tr. 713; O'Brien, Tr. 880-881; Heinzman, Tr. 943; Burgoyne, Tr. 1077, 1104-1105). Many of the better leads were culled out and given to the district manager or the older sales staff (Heinzman, Tr. 942; Van Allen, Tr. 637; *see* Sollo, Tr. 3067).

38. As a result of the many conditions and limitations which respondent places upon the payment of its "guaranteed incomes," most salesmen, who are extended guaranteed income contracts, are unable to either fulfill their contractual obligations or "earn" their guaranteed incomes (Bresnik, Tr. 505; Van Allen, Tr. 658; D. O'Brien, Tr. 870, 879-881; Heinzman, Tr. 940; Burgoyne, Tr. 1080; Peterson, Tr. 2043, 2063-64; Clauss, Tr. 2349-2353, 2369-2371; Toncrai, Tr. 555-557; Bisping, Tr. 715; Laferriere, Tr. 2134; Eastaugh, Tr. 2242-43; Lang, Tr. 2333-36). The record establishes, therefore, that the "guaranteed income" promised in respondent's recruiting advertisements is not a good faith offer and few, if any, recruited salesmen ever actually received the guaranteed income or its equivalent (Findings 26-29, *supra*). [30]

III. Selling Practices

A. *Initial Contact with Prospective Customers*

(1) Advertising Research Analysis Survey

39. The primary means by which EB sells its products and services is through the door-to-door solicitation of consumers (Findings 6, 20, *supra;* 68, *infra*) and the primary purpose of its sales representatives in contacting persons in their homes is to sell EB's products and services (respondents' Answer, Par. 8). In the conduct of its business, and for the purpose of inducing members of the general public to purchase its products and services, EB, through its sales representatives, utilizes various forms of promotional materials in conjunction with oral sales presentations concerning the purpose of the salesman's initial contact with the prospect, the identity of the salesman, the nature of the offer, and the terms of respondent's contracts and other agreements (Complaint and Answer, Par. 7).

40. EB employs a number of methods for establishing contact with prospective customers, one of which is known in the trade as "cold canvassing"—a method whereby a salesman makes initial contact with persons in their homes without prior notification of his visit and where the persons contacted have indicated no prior interest in respondent's products or services to EB (Bresnik, Tr. 488-489, 537; Trescone, Tr. 1496; Dabney, Tr. 1686; Beitch, Tr. 1761; Eastaugh, Tr. 2237-38; Cambria, Tr. 2272; Lang, Tr. 2337-2340; Caine, Tr. 2474; Laferriere, Tr. 2116-18; Newhall, Tr. 2422). When EB's salesmen employ cold canvassing, the most common means by which they gain entrance into the homes of prospects is to represent that the purpose of their visit is to conduct an advertising research analysis survey. EB makes available to its salesmen advertising research analysis questionnaire forms (hereinafter referred to as an "ARA") which contain survey type questions (CX 661,

1270, 1274, 1287, 1547, 2060, 2061). One of EB's former sales trainers described use of the ARA in cold canvassing (Bresnik, Tr. 488-489): [31]

> A. * * * We had what's known as the ARA, the Advertising Research Analysis questionnaire, which could be used either what they call cold by itself and that we could just knock on any door at random and by use of this ARA try and gain entrance into the home, * * *.
>
> * * * * *
>
> A. * * * I think I had a clipboard and I was in an apartment building and I would just knock on the door and say, "This is Mr. Bresnik and I was taking a survey with advertising" and I would hold up and show him these ads * * *.
>
> "We'd like your opinion on a couple ads," something to this effect. If they said, "Sure, come on in," I would go into their home and I would begin on the first page and go through this questionnaire with them, filling in all the information plus the back page where it shows different ads and get their opinion on that. (*See also,* Dabney, Tr. 1686; Eastaugh, Tr. 2237-38; Cambria, Tr. 2272; Lang, Tr. 2337-39; Caine, Tr. 2474; Laferriere, Tr. 2115-18; Beitch, Tr. 1761.)

Customer testimony confirmed the use of the ARA technique by EB's salesmen, as follows (Trescone, Tr. 1496):

> * * * [M]y husband and myself were working out in the back yard, and a gentleman came around to the back and asked if we could answer some questions for a survey or questionnaire. It would just take a few minutes of our time to answer this survey. (*See also,* Newhall, Tr. 2422.)

41. EB's salesmen also use the ARA technique when they visit the homes of "leads," *i.e.,* persons who have sent in coupons from respondent's magazine advertisements or drawing entry cards (Peterson, Tr. 2046; *accord,* Bresnik, Tr. 559; Toncrai, Tr. 570; and *see* Galvez, Tr. 3261-62). [32] Respondent's magazine advertisements and drawing entry cards do not

disclose the fact that persons who respond to such devices will be contacted by respondent's salesmen for the purpose of selling respondent's products and services (*see, e.g.*, CX 751G-H, 752-756, 781, 785, 788, 790, 796, 798, 804-806, 808, 810-813).

42. ARA's are used by EB's salesmen as a ploy to serve as an introduction to a sales presentation. A former salesman described use of the ARA as an introductory technique, as follows (Eastaugh, Tr. 2238-39):

> Q. * * * How would you identify yourself when you approached them at the door?
>
> A. You would identify yourself as the one working for a large firm's promotional campaign, a large marketing firm, and if they asked what firm, you weren't supposed to give any specifics at the door. That is what we learned in training.
>
> Basically, most people would respond and say, "well, if it is only a few minutes, O. K." Then we would come inside, usually compliment on the furnishings and then go into the six question questionnaire.
>
> Q. What would you do after you complete the questionnaire?
>
> A. I would read the bottom line of the last page which says in appreciation for the help you have given us I have been instructed to fill you in briefly on the syntopicon and The Great Books program and to obtain a few additional reactions.
>
> Q. And then what would you do?
>
> A. Then you started into the [sales] presentation. (*Accord,* Toncrai, Tr. 570; Dabney, Tr. 1687-1688; Cambria, Tr. 2272-73; Lang, Tr. 2338; Bernhardt, Tr. 1172; Trescone, Tr. 1496-97; Peterson, Tr. 2046; Caine, Tr. 2474-75; Beitch, Tr. 1752-53; Bresnik, Tr. 489.)

[33] 43. EB's salesman are provided with "form" language to be used in connection with the ARA in order to gain entrance into the home of a prospect (CX 2061):

> You see, one of the reasons we are contacting people who have requested the booklet is that the company is making a study of the effectiveness of our national advertising in each local area. Our Director of Advertising has instructed me to check your answers to a few quick research questions. May I take a few moments to complete my report so I can return it to our Director of Advertising? (*See also,* CX 661, 1274, 1270, 2060.)

According to EB's sales training tape, the intended effect of this language is to give the prospect a reason to honor the salesman's request for admission into his home "not in the role of a salesman" (CX 648-E). EB provides "form" language for use when the prospective customer questions the salesman's representation that the purpose of his call is merely to take a survey (CX 661-B, 1270-A, 1274-A, 1287-A, CX 2061-B). One such document is a letter from the EB Director of Advertising (CX 648E-F). The Director of Advertising's letter referred to in the training tape is used to corroborate the salesman's claim that he is a survey taker (Lang, Tr. 2338; Bresnik, Tr. 431-432), and it describes the salesman as an "interviewer" (CX 660, 1249, 1250). EB also provides its salesmen with specific responses to be used when asked at the door of a prospective customer whether they are salesmen (Beitch, Tr. 1751):

> * * * The two most common objections were, "Are you selling anything?" We were specifically told to say, "No, I am not selling anything, but may I come in?" Then we were supposed to start to go in. The other one was, "Well, how long will it take?" and we were supposed to say, "Only a couple of minutes. May I come in?" (*See also,* Cambria, Tr. 2276; Lang, Tr. 2339; Toncrai, Tr. 610-611; Trescone, Tr. 1498; Dabney, Tr. 1694; Laferriere, Tr. 2118.)

44. EB's salesmen were also taught to use, and did use, various methods of folding or manipulating the ARA to conceal the name of the company on the questionnaire forms and thus [34] their identity when they initially approached the home of a prospective customer as "survey takers" or "interviewers." One

of respondent's former salesmen described the practice (Dabney, Tr. 1687):

> You open it [the ARA] and fold the top of it down so the only part that is showing is the bottom half which has a few questions on it and the part that has the title on it, "Great Books Advertising Research Analysis," doesn't show. I mean, as far as they know, I am just taking a survey, not specifically from Great Books or anybody. (*See also,* Bresnik, Tr. 490-91; Toncrai, Tr. 559-560; Beitch, Tr. 1753-54; Cambria, Tr. 2273-74.)

45. A number of EB's former salesmen testified that the ARA forms which were completed in the homes of prospects were discarded without first being analyzed for any purpose whatsoever (Eastaugh, Tr. 2243; Toncrai, Tr. 608-609; Bresnik, Tr. 530; Beitch, Tr. 1753).

(2) Telephone Talks

46. One of the principal methods which respondent employs to establish appointments at the homes of persons whom it hopes will be interested in its products is "telephone talks" (CX 582, 603, 638; *see* Joint Stipulation, Tr. 2925-2927). EB's salesmen make extensive use of telephone talks to contact leads and set up appointments to visit the homes of such persons (Bresnik, Tr. 481-482; Toncrai, Tr. 579; Van Allen, Tr. 637; Bisping, Tr. 753-754; O'Brien, Tr. 853-855; Heinzman, Tr. 949; Dabney, Tr. 1690; Barad, Tr. 1983-1984; Peterson, Tr. 2051; Laferriere, Tr. 2107; Badger, Tr. 2196-98; Morse, Tr. 2399-2400). The choice of a specific "telephone talk" depends on the type of lead which is available, *i.e.*, leads from magazines or direct mail advertisements, or filled-in drawing entry cards, or lists of persons in a category with whom respondent desires to initiate contact, *e.g.*, families with young children, students, or persons who have previously purchased respondent's products (Heinzman, Tr. 931-932; Bresnik, Tr. 482). EB's telephone talks contain instructions which tell the salesman which specific tele-

phone talk should be used for a specific type of lead (CX 582, 586, 638). The telephone talks are [35] designed to convey the impression that the purpose of the caller's requested visit is only to certify a gift certificate, or to deliver an informational booklet. In using EB's telephone talks, salesmen tell persons who are called that they have won a consolation prize as a result of either entering a contest or being entered into a contest (CX 582B-E, 583B-F, 585B-Q, 586H-W, 587B-C, 589-601). Many of the telephone talks promise that no sales presentation will be given during the requested visit by stating that, "You don't have to buy Britannica [of Great Books], you don't even have to listen to a sales presentation" (CX 585-J, 586-P, 587-B, 589, 590-594, 597-601). In fact, the training tapes of telephone talks instruct salesmen on the use of language to deny that the purpose of the requested visit is a sales presentation when the person called indicates a suspicion that this is the purpose of the requested visit (CX 620-T, 604P-Q; *see* Joint Stipulation, Tr. 2925-27). Telephone talks currently in use by EB's salesmen continue to disguise the true purpose of the salesman's visit (CX 582-B, 583C-F, 638).

47. Testimony by customers of EB verify the fact that the true purpose of the salesman's visit is not disclosed; and that they are informed that the alleged purpose of the visit is to deliver a free prize of some description (Morse, Tr. 2400):

> Someone called up and said that our name was entered into a contest, and we hadn't won first prize, but we had won a consolation prize, and that a representative would have to come by and we would have to sign for it to receive it.

Further testimony shows (Andresen, Tr. 806):

> * * * She said that she was calling in response to a card or—a card that my husband sent in and that she wanted to set up a time when somebody could bring us our free gifts.

(*See also,* Manore, Tr. 2416, Ksycki, Tr. 1261; Svob, Tr. 1031; Morse, Tr. 2400; Lancaster, Tr. 1884; Godwin, Tr. 1124.) [36]

(3) Door Approaches

48. EB's training tape entitled "Telephone Appointment Plan" gives the following instructions on what the salesman should say in approaching the door of a person with whom an appointment has been made during a telephone talk (CX 620-X):

> * * * When the door is answered ask for the party you made the appointment with. "Hello Mrs. Jones, I'm Mr. Stone of Encyclopaedia Britannica and I'm here to deliver a certificate for the free medical encyclopaedia you have been awarded. I have it with me, may I step in?"

(*See also,* CX 604S-T.)

Some of EB's salesmen were instructed to use, and did use, the following recommended door approach language to gain entrance into the homes of persons with whom appointments had been made by the use of telephone talks (CX 1365):

> # 1 (Door Approach)
>
> Hello. Are you Mr. .....? I'm ..... of the Encyclopaedia Britannica. I made an appointment with Mrs. ....., to deliver a certificate for a free Vacation you have been awarded. I have it with me, do you mind if I step in?

(*See* Bisping, Tr. 740; Abernathy, Tr. 778-779; Laferriere, Tr. 2109-2110; Gregg, Tr. 3367; Holmes, Tr. 3129-3130.)

49. The representations which were made at the door by a salesman upon arriving for an appointment are typified by the following:

> * * * when they open it, we would say, "I am Mr. Jackola from Encyclopaedia Britannica. We made an appointment earlier today to present this free vacation certificate to you. I have it with me." (Jackola, Tr. 888.)
>
> * * * * *

> I'd say I was the representative from Britannica and I was there to drop off the vacation certificate that they had won and to [37] validate it and to also fill out a certificate, which was on that certificate an additional certificate which was to be entered into a drawing for another prize. (O'Brien, Tr. 1054.)
>
> * * * * *
>
> * * * At the house I asked if I could identify myself not as being from the company, just as myself, and I identified myself as having talked with them previously, asked if I could come in and have the consolation card signed by them. (Barad, Tr. 1975-76.)
>
> * * * * *
>
> I was just delivering it. I had come out to bring them their free gift. "Hi, I'm Joe Dabney. I brought you a free gift."

(Dabney, Tr. 165; *see also,* Laferriere, Tr. 2113; Bresnik, Tr. 484; Toncrai, Tr. 572; O'Brien, Tr. 855; Heinzman, Tr. 951; Burgoyne, Tr. 1094.)

50. EB's salesmen were instructed to avoid or deny any questions regarding whether they were salesmen when attempting to gain entry into the homes of persons with whom an appointment had been made, as typified by the following testimony:

> Q. At the time you presented the certificate had you indicated to them that you wanted to sell encyclopaedias?
> A. No. We never indicate that we want to sell encyclopaedias.
>
> Q. Did you indicate to them that you were a salesman?
> A. No. (O'Brien, Tr. 1067.)
>
> * * * * *
>
> The Witness: I wish I could give you the exact terms. The point was that we were not to present ourselves as salesmen * * *.

[38] Q. Did these instructions apply only to the phone conversations or to the door presentations which you eluded [sic] to before?

The Witness: Applied to everything. Even in the presentation itself when you got down to the close, if people were to ask the question whether you were a salesman or not, you were salaried and you were a demonstrator, and it didn't matter whether they purchased anything or not. (Badger, Tr. 2200-2201; *see also,* Peterson, Tr. 2072; Laferriere, Tr. 2117; Abernathy, Tr. 782-783; Van Allen, Tr. 638-639.)

51. Salesmen for EB's Compton Sales Division were similarly instructed to avoid direct questions as to their purpose in approaching the homes of prospects (CX 694), and to use their role as survey takers to start a sales presentation, as demonstrated by the text of respondent's training tapes (CX 648 I-J; Beitch, Tr. 1756; Dabney, Tr. 1688; Eastaugh, Tr. 2238; Bresnik, Tr. 489). A former executive of EB's Compton Division testified (Balzano, Tr. 1531):

Q. Do I understand you to say you counsel your sales representatives not to reveal the purpose of their selling books at the door initially?
A. Absolutely.

52. In fact, the ARA, the telephone talks, and the free gifts were used by respondent's salesmen to gain entrance into the homes of persons in order to sell respondent's products (Bresnik, Tr. 484-489; Van Allen, Tr. 639; D. O'Brien, Tr. 854-855; Dabney, Tr. 1691-92; Barad, Tr. 1975-77; Heinzman, Tr. 951-952; Burgoyne, Tr. 1084). The sentence, "Now in appreciation for the help you have given us, I've been instructed to fill you in briefly on the Syntopicon and the Great Ideas Program—and to obtain a few additional reactions," is used by EB's salesmen as a bridge from the ARA questionnaire to the sales presentation (CX 651-D; *see also,* CX 661-D, 1270-C, 1274-C). Respondent's salesmen were instructed to use the following

method to initiate a sales presentation to those prospects with whom appointments were made using EB's telephone talks: [39]

* * * As you begin to fill in this part of the [gift] certificate * * * take the blue preview portfolio [*e.g.,* CX 446] from your case to use as a writing desk. After completing the certificate hand it to the husband and wife on the preview portfolio with a pen for their signature. Then draw it back and congratulate them. "Well, congratulations, and I hope you win the second drawing because if you win * * * I also receive a prize." You will now get smoothly into your presentation with the following comment. "As a further part of our 200th Anniversary Celebration * * * I have been instructed to give you a brief preview. It is mostly pictorial and if you'll read along with me it goes very quickly." Begin your preview in standard fashion. You are off and running * * * for another Art [Certificate] Plan Sale.

(CX 604-U, 620-Z; *see* CX 1365; *see also,* Bresnik, Tr. 487-489; Bisping, Tr. 738; Abernathy, Tr. 779; D. O'Brien, Tr. 856-857; Jackola, Tr. 888; Van Allen, Tr. 672.)

Thus, the evidence establishes that respondent's salesmen do not contact people in their homes primarily for the purposes represented by EB. Such persons approach the homes of people for the purpose of soliciting purchases of EB's products and services.

B. *In-Home Representations*

(1) The Cooperative Plan

53. After gaining entry into the homes of prospects, EB's salesmen are trained and instructed to make a "Cooperative Plan" presentation which, according to EB's corporate secretary, is EB's regular offer (Joy, Tr. 2902.) This presentation is made by salesmen reading from standard presentations incorporated into read-off books and broadsides issued to salesmen (CX 446, 519, 1341, 1346; CX 463, 512, 579, 580, 1319, 1347; *see also,* CX 622-A, 612-B, 651-B).

54. Under the terms of the "Cooperative Plan," a number of items are represented to be "given" to the customer free of charge, or at no charge, in return for [40] the customer's cooperation, as follows:

(1) Permission to list and use the customer's name as an owner;

(2) Send a letter to respondent stating the customer's opinion of the program;

(3) The names of four individuals who the customer believes might be Britannica prospects.

(CX 622-O, 463-W, 512-J, 579-J, 580-I, 652-C, 1319-J, 1347.)

The items, which are allegedly given free under the Britannica cooperative offer, include: Britannica Junior Encyclopaedia or Britannica Atlas and Webster's Dictionary; The Britannica Library Research Service; First Adventures in Learning (CX 475); and Britannica Study Guides (CX 622-Q, 622-Z-6, 579-M, 579-W, 1347-M, 1347-W). Under the Great Books cooperative offer, it is represented that the customer is given free the following items in return for the services set out above: The Great Books Reading Plans, Gateway to the Great Books with Bookrack; Custom-Designed Bookcase (in place of the foregoing the customer may choose the Annals of America or Compton's Encyclopaedia); Britannica Library Research Service; and Great Books Introductory Discussion Plan (CX 652-D, 652-L, 512-M, 512-Z-1, 580-L, 580-X, 1319-M, 1319-X).

55. An executed EB cooperative plan contract indicates the items are allegedly "free" in the following language:

Under the terms of your Cooperative Plan, I agree to the following:

1. To give the Company permission to list and use my name as an owner.

2. To provide the names and addresses of 4 persons who I feel would be good Britannica prospects.

Names and Addresses must accompany this agreement.

[41] 3. To send to the Company, after receiving my materials, a written expression of my opinion of the New Edition of Britannica. I understand that my letter may be reproduced and used, in whole or in part, at the Company's discretion.

Please deliver to me one set of ENCYCLOPAEDIA BRITANNICA, 24 volumes,

in HEIRLOOM binding	. . . .	$598.00
and.....	. . . .	$ .....
.....	. . . .	$ .....

and in return for the above cooperation, the following:

BRITANNICA JR.	. . . .	$No Charge
PRE-SCHOOL*	. . . .	$No Charge
.....	. . . .	$No Charge
Date FEB. 16, 1971	. . . .	$598.00
TOTAL		

* The Britannica Atlas and Dictionary would be indicated in this space if chosen by the customer as part of the cooperative plan.

* * * * *

BONUS FEATURES—As a participant in this *Cooperative Plan,* I will also receive, without additional charge, the Britannica STUDY GUIDES, as indicated below, and full ten-year membership in the Britannica LIBRARY RESEARCH SERVICE. This service entitles me to receive, at my request, up to 100 research reports, subject only to the conditions outlined on the Certificate which will be sent to me.

(CX 1444; *see also,* CX 1007-A, 980-A, 1437, 1446-A, 1447-A, 1452-1453, 1455-1458, 1786-A, 1796-A, 1806-A; *see* CX 626-G.)

[42] 56. EB's magazine and direct mail advertisements make the claim that certain publications are included "free" with the major set (Encyclopaedia Britannica or Great Books) in the cooperative plan (CX 750, 778, 788-790, 796-800, 804, 808-810, 1368, 1623, 1625, 1627, 1629).

57. In the Britannica "Cooperative Plan" sales presentation read-off booklet which salesmen are provided, the prospect is told both that he is to receive the Britannica Study Guides "without additional charge," and that the Study Guides are not available on the open market—"They are an exclusive feature reserved for Britannica owners" (CX 579-V, 1347-V, 1433, 1444, 1786). The Great Books Cooperative Plan presentation states that The Introductory Discussion Plan is a bonus for cooperation and "is an *exclusive* part of the Great Books Co-operative Program and cannot be obtained through any other source" (CX 512-Z-1, 580-X). Through language written on the cooperative plan sales contracts and through the statements of salesmen, respondents represent both that the Library Research Service is included in the cooperative plan "free of charge" or "without additional charge" (CX 626-K, 642-I, 1219-C, 1433-B, 1444, 1447-A, 1796-A, 2025-C), and that "The Research Service is never sold to any individual or institution" and is available only to subscribers on the cooperative plan (CX 463-T, 512-V, 579-S, 580-T, 1319-U, 1347-S).

58. Purchasers of EB products under the cooperative plan were informed and understood that they were receiving various items and services "free" or at "no extra cost" in return for their agreement to provide so-called "cooperative services" (Morse, Tr. 2402; Manore, Tr. 2417; Boyd, Tr. 1329; Ksycki, Tr. 1244, 1255; Turk, Tr. 1226; Passios, Tr. 1148; Svob, Tr. 1018; Andresen, Tr. 810-811). Customers were told that the only item they pay for in the cooperative plan package is the set of Encyclopaedia Britannica or Great Books (Andresen, Tr. 810-811):

> Q. Well, did the salesman make any representations as to whether or not you would be paying for these other materials, the pre-school book or the Junior encyclopaedia?
>
> A. No. Those were free. If we bought the big set, we also got these other books free.

[43] 59. The "Cooperative Plan" is EB's usual and regular method of selling the items contained in the Britannica and

Great Books cooperative packages (Joy, Tr. 2902). Salesmen were trained to only make the cooperative plan presentation (Burgoyne, Tr. 1088, 1097; D. O'Brien, Tr. 861; Abernathy, Tr. 791; Bisping, Tr. 755; Van Allen, Tr. 647; Bresnik, Tr. 527; Yee, Tr. 996; Laferriere, Tr. 2106). In fact, some EB salesmen testified that they were not allowed to make individual sales of items included in the cooperative plan package (Toncrai, Tr. 583-584; Lang, Tr. 2342; Caine, Tr. 2481-82; Svob, Tr. 1014-15, 1017). Thus, the bulk of all sales consists of the "Cooperative Plan" (Joy, Tr. 2901; CX 612, 622, 651, 652).

60. EB's salesmen were trained to allow, and in fact did allow, persons to purchase the products offered under the "Cooperative Plan" without requiring that such persons perform the services apparently required under the plan:

> Q. * * * In the cooperative sales that you made, in how many of those sales did you get the names that were required under the cooperative contract?
>
> A. None * * * (Kalstein, Tr. 2016.)
>
> * * * * *
>
> A. * * * If we could not get them, they [EB] said to just forget about it. (Beitch, Tr. 1761.)
>
> * * * * *
>
> A. * * * So, if you didn't give the names, it didn't make any difference. (Bisping, Tr. 757.)

61. Customers testified:

> Q. Did you supply any of the items that you just described?
>
> A. No, we did not. We did not write the letter to Encyclopaedia Britannica nor did we supply the names of the four individuals. (Ksycki, Tr. 1246.)
>
> * * * * *
>
> [44] Q. Would you please explain fully what the salesman said the offer would involve?
>
> A. I guess it involved getting a special price on the 21-volume set. The rest of the stuff was supposed to be free and then he wanted us to write a letter to the Encyclopaedia Britannica and he wanted some names of people that might

be interested in such a program and asked if they could use our name—use the letter that we sent in.

Q. Did you ever provide such services?

A. I did not. (Andresen, Tr. 834.)

* * * * *

Q. Mrs. Morse, did he require you to do anything in order to obtain the books that he was selling?

A. He requested that we give him four names of people who he could speak to and if he could use our name and if we would write a letter.

Q. Did you perform those services?

A. No. (Morse, Tr. 2402; *see also,* Newhall, Tr. 2425-26; Passios, Tr. 1160; Roberts, Tr. 1829-1830; Logan, Tr. 1839; Manore, Tr. 2417-18; Ridgeway, Tr. 1711-1712; Warwick, Tr. 1784-85.)

62. In instances where persons were reluctant or refused to give the required names of four other prospects, salesmen were instructed to leave a form on which the names could be sent in at a later date (Galvez, Tr. 3271-3273; Eastaugh, Tr. 2244; Van Allen, Tr. 655; Badger, Tr. 2204-2206). EB had no accurate way to check to see if the cooperative plan purchasers had in fact sent in the names in instances where the purchaser was given the opportunity to send the names in at a later date (Galvez, Tr. 3272-73.) [45]

(2) Use of "Retail" Prices

63. The cooperative plan presentation represents to prospects that, because the cooperative plan affords an important source of advertising, EB will "pay" for cooperation; that merchandise and services are "given" to a purchaser for his cooperation (CX 579-M); and that EB will pay the prospect for cooperation "in merchandise" (CX 1347-K). In demonstrating the value of the products being purchased and "given," "retail" prices are utilized.

64. The sales presentation which salesmen are trained to utilize represents the "retail" prices for the Britannica set alone, as follows:

> Britannica's basic library [Britannica set alone] can be purchased at any time at the following prices according to the bindings. However, these prices do not apply on Britannica's Cooperative Plan. The new addition of the 24 volume Encyclopaedia Britannica in our Blue Calf binding sells for $1,200.
>
> In our Green Morocco binding it sells for $1,000.
>
> And in our Heirloom binding for $698.
>
> (CX 622-Z-(7-8), 512-Z-(6-8), 579-Z-(3-5), 580-Z-(4-6), 652-M, 1318-Z-(4-6), 1347-Z-(3-5).

EB's training tape instructs salesmen to present information regarding the "retail" prices for the cooperative plan items as follows:

> Now let's look at the value of Britannica's ten-year educational program:
>
> 1. [T]he 24 volume Encyclopaedia Britannica Now you ad-lib the words * * *
>
> I'm going to put a $698 retail price right beside it. Here you write in the figure 698 then continue * * *
>
> 2. Option to obtain the Britannica Book-of-the-Year for ten years which would be an investment of $89.50.
>
> Now write in 89.50 beneath the 698 then continue * * *
>
> [46] 3. Full ten year membership in the Britannica Library Research Service. Now each of the service coupons cost us $2.60. One hundred of them would cost us $260 if you use the service. If you do not use the service, it would be valueless to you and naturally would cost us nothing. Assuming you did use the service, it would cost us $260 and I am going to enter this figure beside the Library Research Service.
>
> At this point, write in the figure 260 and continue on to the next point and the following ad-lib * * *.
>
> 4. The Britannica Study Guides. These Study Guides cannot be purchased by any individual at any time for any price. Therefore, their value depends on how you use them. If you didn't use them at all they wouldn't be worth $5. On the other hand if they helped you or your family in

business, education or social life they could be worth $500. So I am just going to put down a value of between $5 & $500.

Write $5-$500 next to the Britannica Study Guides on the page and then continue to ad-lib, this time about the cooperation option.

And No. 5. You have either Option No. 1 or Option No. 2 which is given to you in return for your cooperation. Assuming your choice was Britannica Junior, it has a retail price of $149.50.

Write Britannica Junior underneath Cooperation Option on the page and then 149.50 after it, then continue to ad-lib as follows * * *.

As you can see this represents an impressive amount.

At this point you begin to write down dollar signs where a total might be if you would add it up to indicate a lot of money while you are continuing with the ad-lib * * *. But as you can see, the best part of all is— [47] When you are finished with this ad-lib continue reading from the bottom of the page * * *. Now in return for your help at this time, use of your name, testimonial letter, names of four families, the retail price does not apply to you. As you['re] saying the retail price does not apply to you, cross out the figures at the top of the page then proceed to the next page * * *.

May we now ask if we deliver all of these materials and services to you for less than the retail price of the set alone, an average of only 59.80 a year over the life of the program, plus the cost of the optional Book-of-the-Year, can we count on your cooperation?
(CX 622-Z-8-11).)

EB's training tape for Great Books salesmen does not contain instructions on how to list retail prices for the items included in the Great Books cooperative plan, although there is a pause in the tape to allow a trainer to demonstrate how to list the retail prices (CX 652-N, 639-E).

65. Many of EB's salesmen were instructed to list the retail prices for the items contained in the cooperative plan on the back of an acceptance card as demonstrated by CX 1772-B and

CX 1445-B; or on blank sheets of paper, or on an ARA questionnaire (CX 1761; Abernathy, Tr. 785-786; Yee, Tr. 996-997; Clauss, Tr. 2366; Caine, Tr. 2480-81; Heinzman, Tr. 954-955; Bisping, Tr. 750-752; Dabney, Tr. 1688; Beitch, Tr. 1758-1760; Lang, Tr. 2341-42; Bresnik, Tr. 492-493; Barad, Tr. 1978-79; Peterson, Tr. 2059-2060; Eastaugh, Tr. 2232; Cambria, Tr. 2280; Gaboury, Tr. 2316; Toncrai, Tr. 581-583). Some of the salesmen used a page out of the cooperative plan presentation readoff and recorded the retail prices with a grease pencil which could later be erased (Jackola, Tr. 890; Van Allen, Tr. 652-653; Burgoyne, Tr. 1089; Laferriere, Tr. 2114-15; D. O'Brien, Tr. 857; J. O'Brien, Tr. 1056-58).

66. EB's salesmen would list both the retail prices for the individual items contained in the cooperative plan and a total retail price which included all such items. The total "retail" price for the cooperative plan package [48] generally was several hundred dollars more than the cooperative plan price:

> Q. Mr. Bresnik, in informing the potential customer as to the various prices would you use price comparisons?
> A. Yes. At one point we would show the retail price, the 698 price, and compare that to the 598 cooperative price showing the prospect that, if you were to list at retail prices all of the merchandise he was receiving as part of the cooperative program, we would write down 698 plus bookcase, which would be maybe $75 plus a couple other options which might be $50, or something, apiece, and then the Library Research Service.
> We would total all this up, come to a figure over a thousand dollars, I believe, cross this out, and show them that.
> If you took the cooperative program, this would be 598 instead of this larger figure. (Bresnik, Tr. 492-493.)
>
> * * * * *
>
> I was referring to [the] * * * back blank side of the ARA. On that we used to write the items as they read them and the price next to them and then we used to add

up the price and show them the total amount, which, as I remember, was between $1200 and $1300. At that time we would say, "If we could give this to you for $900, wouldn't it be a good deal?" They were pretty well forced to say yes, because we just told them it cost $1300 and here it was for $900.

We did this once more for $700 and then finally we would show them the price we could offer it to them, which varied, depending on who they were. It was $598 for basic co-op plan. I believe teachers got it for $498 and students got it for something in [49] between $498 and $598, but whatever the price was, we would then show that to them and ask them if they thought that was a good deal. (Beitch, Tr. 1759-1760.)

* * * * *

Q. Did he quote you prices for those?

A. Yes. For the entire set of materials which would include the bonuses and paying off in three years, the price for all of that material would range upwards of $800 or $900, but I was to receive the whole package for about four and a half. (Roberts, Tr. 1824.)

* * * * *

A. I quoted them one figure which usually came out above $700 for the group of items. I crossed that number off and replaced it with, I think, the most popular cooperative price was $443. If they wanted to think that they were paying $443—. (Cambria, Tr. 2282.)

* * * * *

A. * * * This is the card he did his figuring on. He has listed here the price, retail prices, of the Great Books, the dictionaries, the Gateway Plan, also the reading plan, totaling $1015. Under the Plan we were to receive the books for $443. (Boyd, Tr. 1325; *see also,* Caine, Tr. 2480-81; Clauss, Tr. 2366-67; Kalstein, Tr. 2010-2012; Peterson, Tr. 2059-2060; Barad, Tr. 1978-79; Lang, Tr. 2341-42; Lafarriere, Tr. 2114-15; Gaboury, Tr. 2316; D. O'Brien, Tr. 857; Van Allen, Tr. 652-653; Bisping, Tr. 750-752; Burgoyne, Tr. 1089; Jackola, Tr. 890; Baird, Tr. 1978-79; O'Brien, Tr. 1056-58; Warrick, Tr. 1780; Ridgeway, Tr. 1706; Godwin, Tr. 1126; Christenberry,

Tr. 1269-1270; Bernhardt, Tr. 1174-75; Andresen, Tr. 834-835.)

[50] 67. CX 980-A is an executed sales contract. On this conract, the salesman showed $598 as the total price of the Encyclopaedia Britannica, 24 volumes, with the figures 698 crossed out; First Adventures In Learning was shown as N/C with the figures 39.50 crossed out; and Britannica Junior was shown as no charge with the figures 149.90 cross out, as follows:

Please deliver to me one set of ENCYCLOPAEDIA BRITANNICA, 24 volumes,

in Heirloom binding ~~698~~	....	$598.00
and First Adventures	....	$———
in Learning ~~39.50~~	....	$ N/C

and, in return for the above cooperation, the following:

Britannica Junior ~~149.90~~	....	$ No Charge
———	....	$ No Charge
———	....	$ No Charge
Date March 12, 1971	TOTAL	$598.00

68. The claimed retail prices of respondent's publications, which are utilized by salesmen in selling respondent's cooperative plan, are not the prices at which such publications have been sold in substantial quantities to the general public. To the contrary, respondent has made only isolated or insignificant sales at the represented retail prices. CX 723 shows the various offers in which Encyclopaedia Britannica is sold in combination with accessory publications, the number of sales of each such combination offer from January 1, 1969 through May 1971, and the prices at which such sales were made. CX 724 shows the number of sales of Encyclopaedia Britannica at retail prices during this same period. A comparison of CX 723 and CX 724 reveals through [51] the following formula that only 2.58 percent of the Encyclopaedia Britannica sets sold from January 1, 1969 through May 1971 were sold at the retail prices:

Number of EB combination	
Number of EB retail sales	6,272=2.58%
sales + EB retail sales	243,079

CX 726 shows the Great Books sales made at retail and in combination offers. A comparison of these sales reveals that only 8.55 percent of Great Books sales were at the retail prices:

Number of Great Books retail sales	3,221=8.55%
Number of Great Books combination sales + retail	36,953

69. EB's cooperative plan presentation is designed to lead the prospective customer into believing that he is receiving certain merchandise free of charge in exchange for cooperative services the customer is to furnish, that the entire plan or package of merchandise and services can be obtained at a substantial savings over the regular offering price of the merchandise or of even the encylopaedia set alone through this cooperative feature. The canned sales presentation, which salesmen are trained to use, and do use, states that merchandise and services are "*given to you* in payment for your cooperation" (CX 1347-M, for example). As a fact, the cooperative plan is respondent's regular price for respondent's merchandise sold on a door-to-door basis. Retail prices are not applicable to respondent's cooperative plan for any of the merchandise and services. None of the merchandise is given free of charge or is given in exchange for cooperation; the merchandise and services are part of the total plan or package. As has been heretofore found, respondent's salesmen are not trained to make any offer or sale other than the cooperative plan (Finding 59). Some of the products and services are never sold, but are available only through the cooperative plan (Findings 57-59). Thus, it is clear that respondent's cooperative plan sales presentation and the use of "retail" prices are designed to mislead consumers into believing that the cooperative plan offers substantial savings to them when such plan is respondent's regular offer and no savings are, in fact, realized. [52]

(3) Limited Offer

70. EB's salesmen, following EB's *standard presentation,* emphasize that the cooperative plan must be purchased immediately:

> Since the Company needs your promotional and sales held *right now* * * * after you have seen the details of our Cooperative Offer * * * we ask your acceptance or rejection. FAIR ENOUGH? (CX 579-L, 622-P, 463-M, 512-L, 580-K, 1319-L, 1347-L.)
>
> * * * * *
>
> If you wish to acquire the entire Britannica Program *NOW* * * * the payments and services previously described will be given to you in return for your cooperation. (CX 579-X, 622-Z-6, 1347-X.)
>
> * * * * *
>
> Since the promotional and sales help outlined will be of value only if you are enthusiastic about owning Britannica NOW * * * *your immediate acceptance or rejection of our Cooperative Proposal is required.* (CX 579-Z-1, 512-Z-4, 580-Z-2, 1319-Z-2.)
>
> * * * * *
>
> There are two reasons why the Company requires your immediate acceptance of this Cooperative Offer. (CX 579-Z-(21-33).)

The emphasis on the necessity of immediate acceptance creates the impression that the cooperative plan price is a special price, not the price at which respondent regularly sells its publications, and is available only at the time of the salesman's visit (Svob, Tr. 1017-1020; Morse, Tr. 2403; Passios, Tr. 1148; *see also,* Siegler, Tr. 1804, 1807; Newhall, Tr. 2424).

[53] 71. Respondent has placed in magazines of national circulation advertisements which describe the cooperative plan as a limited offer:

> Yes, the latest edition of Encyclopaedia Britannica—the greatest treasury of information ever published—is now available to you on this remarkable Cooperative Offer.

> For a limited time, you can receive both Britannica's Pre-School Library and Britannica Junior Encyclopaedia free of extra cost with Encyclopaedia Britannica. All three complete sets will be placed in your home NOW * * *. (CX 779, 814, 815).

72. Respondent maintains that, if the cooperative plan is rejected by a person, he must wait 12 months before such offer will be extended again, and that the customer certifies at the time of purchase that he has not previewed and declined the cooperative plan in the last 12 months. Further, EB claims that names of persons, who have previewed and rejected the cooperative plan, are retained on file, and that the purchase contracts of prospective cooperative plan purchasers are checked against the file of names to insure that the EB policy is implemented (RPF III 3). The record does not reveal that any prospective cooperative plan purchaser was refused the right to purchase under the cooperative plan because he had previewed and rejected the cooperative plan offer during the previous 12 months. Further, the record indicates that many prospects refused to sign rejection cards, or the sales presentation was aborted prior to arriving at the card signing stage (Findings 31-36). Even assuming, however, that respondent does have a policy of not offering the cooperative plan to any person but once each twelve-month period, and assuming the policy is faithfully carried out, this would not of itself legitimize what is otherwise a deceptive sales scheme.

(4) Duration of Salesman's Visit

73. During a sales presentation, the salesman reads two large notebooks or read-offs (*e.g.*, CX 579, 446), which consist of over one hundred pages of printed wording, and he utilizes ten large fold-outs or broadsides (CX 468, 469, [54] 470, 471, 472, 473, 474, 475, 476, 494), most of which measure 4′ x 3′ and contain extensive wording (*see* CX 612, 622, 652). Respondent's training tapes entitled "advanced closing" (CX 608, 628, 649) instruct the salesman to use what is called the "five-

point close" if the sale is not made upon completion of the cooperative plan presentation. In the first step of the "five-point close," the salesman describes the amount of monthly payments in terms of the "cost of a quart of milk a day." Step two is the "closing check story" where the salesman uses a blank check (CX 502) to set out the prospect's weekly expenses to show that the prospect can afford the cooperative plan. The third step is called the "sum-up-close" in which the salesman attempts to show that the prospect can afford the cooperative plan by again describing the cost in terms of a daily average. If the "sum-up-close" fails, the salesman then gives the prospect a rejection card (CX 497) which states that the prospect has declined participation in the cooperative offer. The last step in the "five-point close" is the "drop." At this point the salesman offers the prospect the least expensive binding for the Encyclopaedia Britannica or Great Books set (CX 608, 628, 649).

74. In contacting prospects, EB's salesmen represent that they will only take a few minutes to complete the ARA survey or to fill out the gift certificate (Dabney, Tr. 1691; Laferriere, Tr. 2113; Cambria, Tr. 2272; Peterson, Tr. 2071; Toncrai, Tr. 584; Bresnik, Tr. 494; Van Allen, Tr. 640; Caine, Tr. 2474; Trescone, Tr. 1504; Beitch, Tr. 1751; J. O'Brien, Tr. 1069; CX 661-B, 1270-A, 1274-A, 1287-A, 1547-A, 2061-B). Respondent's salesmen also represent to prospects that even the presentation of respondent's products will take only a few minutes (Ksycki, Tr. 1241):

> * * * then he identified himself as a representative of Encyclopaedia Britannica and asked if he could take a few minutes of our time to explain one of their cooperative programs to us * * * (*See also,* Bernhardt, Tr. 1171; Passios, Tr. 1141; Svob, Tr. 1014; Siegler, Tr. 1799-1800; Baird, Tr. 1879; Clauss, Tr. 2365; Warrick, Tr. 1779; Burgoyne, Tr. 1086; Hill, Tr. 2377-2378.)

[55] 75. Many salesmen testified that they required at least an hour to give a full sales presentation (Heinzman, Tr. 971; Abernathy, Tr. 804-805; Burgoyne, Tr. 1099; Badger, Tr. 2201;

Laferriere, Tr. 2135; Dabney, Tr. 1692-1693; Van Allen, Tr. 671; Toncrai, Tr. 584; *see* Bresnik, Tr. 494). In some instances, the salesman would remain in a prospect's home for over two hours (Andresen, Tr. 809; Hill, Tr. 2385; Godwin, Tr. 1125; Trescone, Tr. 1508). Thus, EB's sales representatives do not ordinarily complete their presentations inside prospects' homes within only a few minutes. Therefore, the representations of respondent's salesmen were and are false, misleading and deceptive.

(5) Library Research Service

76. EB's Library Research Service is a service whereby questions from purchasers of Encyclopaedia Britannica and Great Books are answered and information on various topics is made available to such purchasers (CX 474, 522, 463-T, 512-X). The customer is given one hundred coupons, each of which may be used to obtain a report on topics contained in a catalogue (RX 4), or to obtain a special report which contains information with respect to matters not listed in the catalogue (RX 5; CX 474). EB's standard sales presentation contains representations regarding the Library Research Service. These representations are found in respondent's printed sales presentation, and in a large fold-out or broadside which is displayed in conjunction with the printed sales presentation. Respondent's salesmen represent to prospects that the Library Research Service will provide information on any subject with the only exception being medical and legal advice (CX 463-S, 463-T, 512-U-W, 579-R-S, 580-S-U, 1319-T-U, 1347-R-T, 474, 522, 1313, 1358).

77. Sales materials, which EB salesmen utilize in making presentations to prospects, contain the following representations concerning the quality of research provided by the Library Research Service:

> * * * Our vast research staff * * * located in major libraries and universities * * * will do all of the tedious research work * * * compile the information in manuscript

> form * * * and return the reports for your permanent possession. (CX 512-V, 579-S, 580-T, 1319-U, 1347-S.)
>
> * * * * *
>
> [56] * * * Our vast research staff will do all the tedious research work and data compilation and return it to you in report form for your permanent possession. (CX 1522-E.)
>
> * * * * *
>
> Dedicated exclusively to the service of Encyclopaedia Britannica owners, the Library Research Service answers any of the hundreds of questions encountered in your Home, Business, Professional, Educational and Social life. (CX 474, 1358.)

One of the broadsides utilized by EB salesmen states:

> Our vast research staff, located in major universities, and libraries, provides detailed and authoritative information on any subject you request other than medical or legal advice. As a Britannica owner, you get the same type of research advice for which business and professional people would expect to pay thousands of dollars a year to obtain. (CX 474.)

78. EB's salesmen have represented that the reports requested from the Library Research Service would be similar or identical to college term papers in form and content (Manore, Tr. 2419-2420):

> Q. During the sales presentation, what, if anything, did the salesman say about the library research service?
>
> A. That you would receive a book with coupons which covered ten thousand different subjects, and you could take the coupons you received along with twenty-five cents and receive back an essay type on each of the subjects.
>
> If you filled the number in, you would receive back something on it. If you didn't—if something you wanted wasn't covered on one of these topics, you could send in under your own title, and you would receive back a report which [57] could be used in lieu of a term paper. You could copy it over and use it as your own term paper, thesis, or such.
>
> He said that the material you would receive would be exhaustive in substance. The only thing it wouldn't cover

would be medical and legal questions. (*See also,* Lancaster, Tr. 1892-93; Baird, Tr. 1872; Siegler, Tr. 1800-1801, 1813-14; Ridgeway, Tr. 1706-1707; Boyd, Tr. 1328; Ksycki, Tr. 1247; Newhall, Tr. 2426.)

79. The contracts executed by EB's customers reveal that, *subsequent* to purchasing Encyclopaedia Britannica or Great Books, they will receive a certificate (RX 5) which sets out the conditions for use of the Library Research Service (CX 980, 1007, 1433, 1437, 1444, 1447, 1452, 1453, 1455, 1786, 1796). Some limitations are set out in the certificate, as follows:

> You may request as many as 10 reports a year, but not more than one at a time or more than one a month.
>
> * * * * *
>
> We prepare reports only on those subject not already discussed in Britannica publications; we do no research in foreign language sources.
>
> * * * * *
>
> We cannot answer questions relating to the fields of medicine or law; nor do we prepare reports in areas which invade professional fields or which we believe are in violation of good business ethics. We do not answer contest questions or supply illustrative material.
>
> * * * * *
>
> We reserve the right to determine what constitutes one question, and whether your query comes within the scope of the Britannica Library Research Service. (RX 5; *see also,* Stenberg, Tr. 1420; Coke, Tr. 1298; CX 735; RX 103-106.)

[58] Limitations set out in this certificate are not disclosed during respondent's sales presentation (CX 612N-O, 622-Y, 622-Z-1, 652-I-K).

80. According to the director of EB's Library Research Service, the limitations of the Library Research Service are more extensive than those revealed in the certificate. The Library Research Service refuses to answer questions relating to genealogy (Stenberg, Tr. 1394; CX 728, 731, 740). The Library

Research Service refuses "out of hand" requests for term papers or theses (Stenberg, Tr. 1399; *see* CX 730, 732, 734, 739, RX 98). In addition, the Library Research Service will not answer requests for advice in arranging furniture for a particular room, or a particular floor plan (Stenberg, Tr. 1417-18). The Library Research Service does not answer questions relating to any medical *topic* (Stenberg, Tr. 1418; CX 744). A number of specific requests were refused because they related to medical topics (Stenberg, Tr. 1419-1420; CX 735, 736, 737, 738; *see also,* Clark, Tr. 2787-2793).

81. The research staff, which compiles responses to requests made to the Library Research Service, does no original writing in the reports it produces. The extent of the work done by the research staff on topics not covered in the Library Research Service Catalogues is limited to reproducing passages, paragraphs or pages from selected sources. These reproductions are then pasted on sheets of paper with notations of the sources, and a bibliography is typed in at the end. As thus completed, the report is then sent to the subscriber (Stenberg, Tr. 1424-26).

82. Some EB customers, who testified in this proceeding, expressed disappointment at the quality and responsiveness of the special reports:

> A.* * * I was interested in Edmund Burke's thoughts on the French Revolution, so I wrote them asking about this. What they sent to me looked like a copy from some encyclopoaedia. I was expecting some original research. (Coke, Tr. 1297; *see also,* CX 1451A-C.)
>
> * * * * *
>
> Q. Would you briefly summarize what the report is about? [59]
>
> [Colloquy omitted.]
>
> A. Xerox of two articles, Basic Theory, International Dictionary of Applied Mathematics and Applied Reading.
>
> There is nothing that pertains to biographical information about Mr. Doolittle which was my request. (Clark, Tr. 2782-83; *see also,* CX 1505.)

83. Persons subscribing to respondent's Library Research Service will not receive answers to any questions except those requesting medical and legal advice The answers provided by respondent's Library Research Service are not the product of exhaustive, original research, and, in some instances, are not responsive to the question asked. Further, the answers are not in the form of a college theme or thesis.

C. *Lead-Getting Activities*

84. In the course and conduct of its business, EB has conducted various contests and utilized other promotional devices for the purpose of obtaining leads to persons whom respondent's sales representatives can contact and hopefully gain admission into said persons' homes for the purpose of inducing purchases of respondent's products. Among the inducements used to achieve the above purposes are offers of free merchandise, gift certificates and informational brochures obtained upon return of reply cards contained in promotional materials (respondents' Answer, Par. 9). EB uses extensive magazine and direct mail advertising to obtain the names of persons to be contacted for the purpose of giving such persons a sales presentation (Curtin, Tr. 2841; CX 817). The advertisements request that the reader return an attached response card to receive a free booklet and/or information on how to obtain respondents' publications.

85. None of respondent's advertisements disclose that persons who respond to such advertisements will be contacted by respondent's salesmen (*see e.g.*, CX 751G-H, 752-756, 774-816). To the contrary, the following examples [60] give the impression that readers will receive the materials offered by mail:

> PREVIEW BOOKLET OFFERED FREE. May we send you, free and without obligation, our special new Preview Booklet which pictures and describes the latest edition of Encyclopaedia Britannica? For your free copy, and complete information about how you may obtain the Britannica Pre-School Library and Young Children's Encyclopaedia

> free of extra cost with Encyclopaedia Britannica, mail the postage-free card now. (CX 810.)
>
> * * * * *
>
> PREVIEW BOOKLET OFFERED FREE. Like to learn more about how your family can enjoy the advantages of Britannica Junior—*free of extra cost*—when you choose Encyclopaedia Britannica on our Cooperative Offer? Simply mail the attached card now. We will send you free—and without obligation—our colorful Preview Booklet which pictures and describes the latest edition. (CX 790.)
>
> * * * * *
>
> PREVIEW BOOKLET OFFERED FREE
>
> Simply fill in and mail the postcard today, and we will send to you * * * *without extra cost or obligation* * * * a copy of our beautiful new booklet which contains an exciting preview of the latest edition of Encyclopaedia Britannica. Mail no money. It's yours *absolutely free!* * * *. When we receive your postcard, we will send your free booklet. There is no oblgiation, of course. However, to avoid disappointment, please mail the card today before it slips your mind. (CX 806; *see also,* CX 805, 811.)

EB's magazine and direct mail advertisements for the Encyclopaedia Britannica set and accessory publications [61] emphasize in bold letters that such publications are available to the reader, "direct from the publisher" (CX 781, 785, 790, 796, 804, 808, 810, 813). The language of response cards reinforces the suggestion that booklets and information will be sent by mail and that materials are received "direct from the publisher":

> GENTLEMEN: Please send me, *free and without obligation,* your colorful Preview Booklet which pictures and describes the latest edition of ENCYCLOPAEDIA BRITANNICA. Also send complete information on how I may obtain this magnificent set, *direct from the publisher,* on the Book a Month Payment Plan—plus BRITANNICA JUNIOR ENCYCLOPAEDIA and BRITANNICA'S PRE-SCHOOL LIBRARY—free of extra cost. (CX 765, 766, 1625.)
>
> * * * * *

> GENTLEMEN: Please send me, *free and without obligation,* your colorful Preview Booklet which pictures and describes the latest edition of ENCYCLOPAEDIA BRITANNICA—and complete information on how I may obtain this magnificant set, *direct from the publisher,* on the Book a Month Payment Plan, plus Britannica Junior Encyclopaedia and Britannica's Pre-School Library—free of extra cost. (CX 788, 789; *see also,* CX 750.)

Respondent EB apparently appreciates the fact that its advertisements may create the impression that all literature or other information will be sent through the mails. EB's ARA questionnaire has a "form" statement to be used *if* the prospect questions why a salesman is calling ["(if subject says he thought the report or catalog would be mailed to him, * * * say:)" (CX 1547-A)].

86. In addition to magazine and direct mail advertising, EB disseminates drawing entry cards (CX 752, 756, 1343-K) to obtain the names of persons to be contacted for the purpose of selling respondent's [62] publications (Gervasio, Tr. 2159-2170; Bisping, Tr. 749; Curtin, Tr. 2855-56; Heinzman, Tr. 933-936). Contest entry cards are placed by respondent's salesmen in various public establishments, such as shopping centers, book stores, grocery stores, barbershops, and at public affairs such as auto shows or boat shows (*see* CX 630, 632; Heinzman, Tr. 933; Holmes, Tr. 3136; Martinez, Tr. 3183; Gregg, Tr. 3368). The drawing entry cards do not disclose that persons who send in such cards will be contacted by a salesman for the purpose of selling respondent's publications; rather, the cards state that senders will have a chance to win one of respondent's publications with "no obligation" and that "winners will be notified by telephone" (CX 752-756).

D. *Buyer's Cancellation Rights*

87. All of respondent's purchase agreements contain a section captioned "Notice to Buyer" which typically is printed in

the same size print as other sections of the contract. Some of the agreements contain the following language:

> NOTICE TO BUYER: 1. Do not sign this credit agreement before you read it or if it contains any blank space. 2. You are enittled to a complete filled-in copy of this credit agreement. 3. You may at any time pay your total indebtedness. 4. This agreement will be verified within four days to secure mutual acceptance. 5. You are to receive a statement each month which will show the balance due at the beginning of the period; the dollar amount of each purchase; credits to your account during the period, and the amount of the finance charge. (CX 1218.)

Some of the agreements vary the language as follows:

> 4. This agreement will be verified within four days to secure your final acceptance. (CX 2018, 1348, 1219, 1452-1453, 1455-1458.)

One Great Books agreement states:

> [63] 4. You have the right to rescind this agreement at any time within 4 business days of the date of this agreement by mailing notice (certified mail recommended) to P. O. Box 3411, Chicago, Ill. 60654. (CX 2013; *see also,* Tr. 2412-13.)

88. Respondent's salesmen are trained on how to properly fill in a purchase contract (CX 626-642). They are taught to go over the merchandise the customer is getting, the price he must pay, monthly terms, sales tax, and shipping instructions, and by doing so they will be able to "button up" the sale (Cohan, Tr. 3446). However, respondent explicitly instructs its salesmen not to read the "Notice to Buyer" section when going over the contract with any consumer; in fact, the salesmen are instructed to get the purchaser's signature without affording the purchaser any opportunity to read this critical section (CX 626-N, 642-K; Peterson, Tr. 2069; *see also,* Toncrai, Tr. 586-587; Van Allen, Tr. 649, 676-677, 698; Cambria, Tr. 2294). Consumer testimony corroborated the fact that EB's salesmen did not inform purchasers that, under the terms of the contract, they had a

right to cancel their purchase (Baird, Tr. 1881; Orsborn, Tr. 1856; Roberts, Tr. 1831-32; Morse, Tr. 2412; Newhall, Tr. 2429).

89. Respondent has a practice of making a verification telephone call to purchasers of its products within a few days of the signing of the agreement. Respondent has a standard telephone verification talk which indicates clearly that the purpose of the telephone call is to determine if the information shown on the contract turned in by the salesman is correct (CX 2062). Thus, the telephone call is obviously an order verification device, not a method of informing the purchaser that he has a right of cancellation (Passios, Tr. 1176-77; Roberts, Tr. 1831-32; Baird, Tr. 1881; Orsborn, Tr. 1854-58; *see also,* Swanson, Tr. 3532). In fact, purchasers believed the verification telephone call concerned the credit rating of the purchaser, or was to assure that the salesman had not falsified the transaction and that the information shown on the contract was correct (Svob, Tr. 1027; Passios, Tr. 1176; O'Brien, Tr. 1059; Ksycki, Tr. 1262, 1264-65). Neither the contracts, respondent's salesmen, nor the telephone verification call informs the purchaser that he or she at any time had the right to cancel or rescind the purchase contract at any time. [64]

IV. Continuity Book Programs

A. *Method of Shipment*

90. In the course and conduct of its business, respondent EB, through its subsidiary, Britannica Home Library Services, Inc. (BHLS), has disseminated and is disseminating advertisements in various publications of general circulation or in promotional materials mailed to members of the general public for the purpose of inducing persons to become subscribers to continuity book programs. A continuity book program is a procedure whereby persons receive the first volume in a series of volumes free; thereafter, the next two volumes in the series are

sent to the subscriber on an approval basis at the rate of one volume per month for two months; and, if the subscriber does not cancel the program, the subscriber receives, on approval, the remaining volumes in a single shipment. All volumes are paid for at the rate of one volume per month (Answer, Par. 10; Collins, Tr. 1565). (EB's continuity book programs involve the negative option plan of selling (Collins, Tr. 1566, 1594).

91. Continuity book programs promoted by respondents include the following:

> The International Wildlife Encyclopedia, The Annals of America, The Illustrated Family Encyclopedia of the Living Bible, The Practical Encyclopedia of Good Decorating and Home Improvement, The Illustrated World of Science Encyclopedia, The World of Man, Compton's Encyclopedia Young Children's Encyclopedia, The New Illustrated Medical and Health Encyclopedia, The Practical Handyman's Encyclopedia, Popular Mechanics Do-It-Yourself Encyclopedia, People of Destiny, The International Family Health Encyclopedia, The Library of Science, Nature and Man's Environment (Respondents' Answer, Par. 10; *see also,* CX 833-865, 878-888; RX 188, 192, 197, 213.)

[65] BHLS made mailings of some 39 continuity program promotional brochures during the period January 1972 through March 1974 (Stipulation, Tr. 3670-76). BHLS shipped approximately one quarter of a million (250,000) continuity units to approximately twenty-eight thousand (28,000) subscribers in calendar year 1973. A continuity unit consists of a single shipment of a book or books in the continuity series; for example, the shipment of volumes 1 and 2 and 3 would be made separately and constitute three units, and the bulk shipment of the remaining volumes would constitute one unit for a total of four units (Collins, Tr. 3610-11). BHLS also ships year books which go each year for a ten-year period to purchasers of Encyclopaedia Britannica, Great Books, and Compton's. In 1973, BHLS shipped approximately one and one-half million yearbooks (Harden, Tr. 3612-13). EB, through BHLS, does

a substantial volume of business in the sale of continuity book programs (CX 889-891).

92. To advertise a continuity program, BHLS uses direct mailing packets, which generally contain a return envelope; a large colorful fold-out describing at length the merits of the program itself; a four-page letter elaborating and re-emphasizing many of the points made in the fold-out; and a "FREE BOOK CERTIFICATE" or "FREE GIFT CERTIFICATE" which briefly describes the terms of respondent's subscription offer and, if signed and returned to respondent, entitles the subscriber to one volume free (CX 833-865, 878-888; RX 188, 192, 197, 213).

93. Through the use of standardized language in continuity mailing packets, BHLS has represented, directly and by implication, that subscribers to BHLS' continuity programs are accorded the option of receiving a single book at a time, and thereby are afforded the opportunity to review on approval each book separately, and to reject or accept each book separately, and to pay for a book-a-month until the program expires (CX 850-A, 851-H, 852-A, 853-A, 854, 855-A, 856-C). The four-page letter accompanying some mailings states:

> To obtain your fabulous free first volume, simply initial and mail the enclosed Gift Certificate. After receiving your volume, if you are not convinced that you and your family have begun to acquire the most [66] wonderful encyclopedia of American history it is possible to possess for your home library, keep the introductory volume as our gift, and that will be that.
>
> Otherwise, each big new colorful volume will come to you ENTIRELY ON APPROVAL for 10 days' FREE EXAMINATION—with no obligation to keep or buy. Volumes 2 and 3 will come to you about one a month; after that, you will be notified in advance of all future shipments, all sent ON APPROVAL. With 10 days' FREE EXAMINATION you may decide whether to keep any shipment or not—you may return it and owe nothing for it or you may remit subscriber's low price—*for only one book each month.* (CX 837-E; RX 199G.)

Another letter used by BHLS in its mailings represents that:

> Each volume will come to you ENTIRELY ON APPROVAL for 10 days of FREE HOME EXAMINATION AND TESTING—at the rate of about one a month. Please remember that each volume is STRICTLY ON APPROVAL. Within the 10-day FREE EXAMINATION period—you may keep it and remit the extremely low price of just $3.98 plus a few cents for shipping. (CX 888-G; *see also,* CX 845-G, 846-F, 884-E, 885-E, 835-D; RX 235G.)

A "FREE GIFT CERTIFICATE" used by BHLS to inform subscribers about the continuity program is as follows:

> VOLUME I OF THE ILLUSTRATED WORLD OF SCIENCE ENCYCLOPEDIA
>
> FREE GIFT CERTIFICATE
>
> NO OBLIGATION TO RETURN GIFT OR TO PURCHASE FURTHER VOLUMES
>
> Please send me Volume I of the ILLUSTRATED WORLD OF SCIENCE ENCYCLOPEDIA entirely free [67] and without obligation of any kind. After examining it, if I decide I do not want to inspect later books in the series I will notify you within 10 days after my free volume arrives. Otherwise, I am entitled to receive additional volumes in this series for my free examination. I am not obligated to accept any minimum number of volumes and may request that you discontinue future shipments at any time. For any books that I decide to keep, you will bill me just $3.98, plus a small amount for shipping, per volume. Regardless of whether I decide to examine any future volumes in the ILLUSTRATED WORLD OF SCIENCE ENCYCLOPEDIA, Volume I is mine to keep. (offer limited to one gift volume per family)
>
> Signature.....
>
> YOURS FREE

(CX 846-A; *see also,* CX 884, 885; RX 232, 237, 239, 240.)

Another form of "Certificate" reads:

> As a home trial subscriber I will be notified in advance regarding monthly shipments for 10 day free use and examination of the 2nd, 3rd and all remaining volumes of this home medical library. (RX 188B.)

94. BHLS fails clearly and conspicuously to disclose in its continuity mailings that subscribers to BHLS' continuity programs receive a bulk shipment of all the remaining books in the series after receiving the first few books on a book-per-month basis (see, *e.g.*, Aycox, Tr. 1622; Appino, Tr. 1650; Odell, Tr. 1905; Beaman, Tr. 1917; V. Bozell, Tr. 1947; Bowen, Tr. 2578, 2580; Bellerose, Tr. 2608, 2612; Burbank, Tr. 2618; Andersen, Tr. 2702, 2707; *see also*, Bleveans, Tr. 3675; Collins, Tr. 1599). Many of BHLS' direct mailing continuity packets make *no* disclosure at all that it will ship to subscribers all but the first few books by means of a single bulk shipment (CX 835, 837, 845, 846, 884, 885, 888; RX 188, 197, 231, 232, 237, 239, 240). In other instances where [68] BHLS does make a disclosure of the bulk shipment of the remaining volumes, such disclosure is on the third page of a typewritten letter in small type interspersed with such bold type statements as "ACCEPT A FREE 'SAMPLE' NOW-DECIDE LATER;" "CANCEL ANYTIME YOU WISH;" "ENTIRELY ON APPROVAL * * * FREE EXAMINATION * * * for only one *book each month*" (CX 833-D). In many instances where BHLS makes mention of the bulk shipment in its mailing packet letter, it fails to disclose the bulk shipment on its certificate which the customers sign to enter the program (CX 833, 838, 840, 882, 847, 850, 859, 860, 861).

95. BHLS forwards a promotional letter with each of the first three volumes it ships in any series (CX 866, 867, 868). The only disclosure regarding the impending bulk shipment appearing in the 11 typewritten pages of promotional literature received by subscribers appears in the letter received with volume 3:

> Because we know you are anxious to have the remaining volumes of your set now * * * to browse through them at your leisure * * * and to have them available as a reference work, we have made arrangements to send you the remaining 17 volumes of your set ON APPROVAL, in one shipment that will arrive next month! (CX 868-A.)

96. With only two exceptions, both early in 1972 (RX 188, 199), all continuity program promotional brochures utilized by BHLS since January 1972 have indicated, on the certificate which the potential subscriber signs and returns to BHLS to receive the program, that the subscriber would receive Volume 1 as a free gift, Volume 2 the following month, Volume 3 the month thereafter, and that the fourth shipment would be a bulk shipment of the remaining volumes in the program (RX 187, 192, 198, 200-229). Thus, some additional disclosures of the bulk shipment have been made since 1972.

97. Consumers believed that they would be afforded the opportunity to receive and review on approval each book separately, and regarded such an opportunity as an important feature of the subscription programs (Odell, Tr. 1903-1904; Aycox, Tr. 1619; Bowen, Tr. 2578, 2581; Burbank, Tr. 2620; Nickelsberg, Tr. 2652; England, Tr. 1661; [69] Bozell, Tr. 1937). Many consumers do not read or understand the bulk shipment disclosure which accompanies the shipment of the third volume in any series (England, Tr. 1665-66; Burbank, Tr. 2625; Appino, Tr. 1650; Odell, Tr. 1905; Bowen, Tr. 2580; Belerose, Tr. 2608; Andersen, Tr. 2752); had not wanted nor authorized the receipt of a single bulk shipment; and were unaware such a procedure would be used (Bowen, Tr. 2579; Appino, Tr. 1648; Odell, Tr. 1906; Nickelsberg, Tr. 2664). The first time many subscribers were aware that remaining volumes would be sent in a bulk shipment is when the shipment was received (Odell, Tr. 1905-1906):

> * * * My wife and I both were somewhat taken by surprise, I would say a little bit dumbfounded in the fact that we would receive 14 volumes all at once, when we understood that we were to receive one volume per month. (*See also*, Appino, Tr. 1650-52; Beaman, Tr. 1917; Ander-

sen, Tr. 2701-2702; Aycox, Tr. 1622; Bozell, Tr. 1947; Bowen, Tr. 2578; Burbank, Tr. 2618.)

98. In a letter accompanying the bulk shipment to consumers, BHLS recognizes that purchasers will have difficulty evaluating the bulk shipment within 10 days (CX 869-B):

> Naturally, there is far too much for you to cover in one sitting.

A consumer corroborated the difficulty of reviewing the bulk shipment within 10 days (Aycox, Tr. 1622):

> Q. * * * After you received Volume Number Three what other volumes did you receive?
> A. I received Volume Number Four through the entire set, which was twenty volumes.
>
> * * * * *
>
> Q. Why did you decide to keep these volumes?
> A. Well, with the promise of examination, ten-day examination, I couldn't possibly give a fair examination of the remaining sets within ten days, and as I first stated, I decided to keep them for the children, and I had not much choice but to keep the whole set or just send the whole set back, that is, those 17 volumes.

[70]Other consumers indicated that they might as well keep all the books because it just isn't worth the "time," "effort," and "expense" to return the bulk shipment (Odell, Tr. 1906; *see also,* Andersen, Tr. 2704). A letter accompanying the bulk shipment congratulates consumers on "acquiring" their new "set" of encyclopedia (CX 869-B). Although BHLS promises to let subscribers take "as many or as few volumes as [they] like" (CX 833-I), BHLS, in effect, imposes an all-or-nothing bulk shipment upon subscribers (Bellerose, Tr. 2603-2604):

> Q. What, if anything, did you do with the books after you received them with the bulk shipment * * *?
> A. I was overwhelmed. You know, because I wasn't really expecting [them]. I just wasn't expecting any 17 volumes all in one box, and I was rather overwhelmed with all these books.

> They say 10 days to look through them which is a relatively short period of time to go through 17 books and pick out the ones that I wanted to keep, and I didn't realize, I guess, that it would be the company's expense if I had bundled them and shipped them back, and I felt it would be mine, so we kept them. (*See also,* Harden, Tr. 3627- 28; Andersen, Tr. 2704; Aycox, Tr. 1622; Appino, Tr. 1648-1650; Odell, Tr. 1906; CX 1517.)

99. Subscribers to BHLS' continuity programs are not accorded the option of receiving a single book at a time, and thereby are not afforded the opportunity to receive and review on approval each book separately, and to accept each book separately, until expiration of the continuity program. BHLS does not clearly and conspicuously disclose to subscribers the material fact that, when subscribers *initially* receive promotional materials concerning the continuity programs *and decide on the basis of such materials to enter into such programs,* all but the first several books are shipped in mass by means of single bulk shipments. Prior to 1972, most continuity mailings made no disclosure at all in the initial mailing packets [71] of the bulk shipment. Therefore, the representations concerning respondent's continuity programs were and are false, deceptive and misleading.

B. *Subscriber Liability*

100. BHLS' continuity advertisements claim that persons who mail in one of respondent's continuity book certificates will receive a volume of the advertised encyclopedia set "ABSOLUTELY FREE AND POSTAGE-PAID, WITHOUT CHARGE OR OBLIGATION," with "NO-RISK GUARANTEE" and "AS AN OUTRIGHT GIFT" just for the asking (CX 845). A typical continuity mail brochure contains the following representations:

> (1) On the packet envelope:
> YOURS FREE * * * Mail the enclosed certificate for your FREE GIFT copy * * * (CX 845-A.)

(2) On a side of a color fold-out in bold print:

YOURS FREE! YES! TAKE THIS SUPERB 192-PAGE DECORATING VOLUME AS A GIFT! * * * ABSOLUTELY NO OBLIGATION * * * MAIL THE ENCLOSED CERTIFICATE TO CLAIM YOUR FREE VOLUME WITHOUT THE SLIGHTEST OBLIGATION * * * AN OUTRIGHT GIFT * * * YOUR FREE VOLUME * * * YOUR FREE VOLUME is yours to keep ENTIRELY FREE. Send for your FREE VOLUME today! Mail the enclosed Certificate immediately! (CX 845-L.)

(3) On another side of the color fold-out in bold print:

TAKE THIS GIANT 192-PAGE VOLUME ABSOLUTELY FREE-MAIL THE ENCLOSED POSTAGE-FREE CERTIFICATE TODAY! (CX 845-M.)

(4) On a typewritten promotional letter in large type:

* * * affix this SILVER SAVINGS STAMP to the enclosed Certificate and mail it today! [So that you may] ACCEPT THIS ABSOLUTELY FREE * * * VOLUME. (CX 845-C.)

(5) On another page of the letter:

TAKE VOLUME 1 ABSOLUTELY FREE AND POSTAGE-PAID [at least four times]; and without the slightest obligation * * * [to] reserve the *privilege* of FREE EXAMINATION of the rest of the Encyclopedia * * * (CX 845-D; emphasis added.)

[72] (6) On another page of the letter:

MAIL THE ENCLOSED CERTIFICATE TODAY—THIS VERY HOUR— ACCEPT * * * VOLUME 1 WITHOUT CHARGE OR OBLIGATION!; and emphasizes the "FREE VOLUME" at least six more times, while reiterating that Volume 1 is an "OUTRIGHT GIFT" at least two more times (CX 845-G.)

(7) On the certificate in bold print:

YOUR FREE VOLUME * * * [You are] UNDER ABSOLUTELY NO OBLIGATION * * * NOW OR EVER * * * NO-RISK GUARANTEE (CX 845-I.)

Various forms of the above representations are found throughout BHLS' continuity mail brochures (CX 837-J, 846-C, 857-G, 847-A, 833-E, 840-I, 859-H, 864-A, 859-L; RX 188J, 203G, 226-I).

101. BHLS advises subscribers that they can "simply keep the introductory volume as * * * [a] gift * * * and that will end the matter" (Collins, Tr. 1611; CX 833-D). Thus, many subscribers believe that their participation in a continuity program is without risk or obligation. One consumer testified (Dollins, Tr. 2440):

> I understood that if I sent in the card I would get Volume 1. The literature said it would not cost me anything, no obligation, free.
>
> (*Accord,* Warshaw, Tr. 2681; Beaman, Tr. 1912; *see* Appino, Tr. 1647; Windsor, Tr. 2628.)

102. Subscribers to BHLS' continuity programs are subject to obligations and risks, including notification to BHLS to prevent shipment of additional books in the program subscribed to, the return of books found unacceptable, the payment for books accepted, and the risk of encountering problems due to delays in mail delivery and computer error (respondents' Answer, Par. 12). BHLS does not provide subscribers with a stamped, self-addressed card on which they can freely exercise their cancellation right, nor does it provide postage for the return of unordered or unwanted books unless the subscriber makes specific requests for postage. BHLS' literature does not inform subscribers that postage is available from BHLS for the return of [73] unwanted books, and subscribers are therefore unaware that BHLS will make postage available with which to return unwanted books (Collins, Tr. 1606-1607; Bellerose, Tr. 2603-2604).

103. Mail loss and delay has become an increasing problem for BHLS (Collins, Tr. 1575-76). Computer malfunctioning is also a significant problem (Collins, Tr. 1576-77). A substantial

error factor for subscribers in the continuity programs was described as follows (Harden, Tr. 3630):

> Q. Now, under the system that was in operation when you took office as Director of Mail Order * * * Services [in September 1972], was there an error factor present in servicing the continuity customers?
>
> A. Surely.
>
> Q. Would you say that that error factor was substantial?
>
> A. Yes.

It was further stated (Harden, Tr. 3599-3606):

> Q. * * * Mr. Harden, were there any problems that you saw in * * * the matters under your control * * *?
>
> * * * *
>
> A. * * * the continuity mailings, there were a great many problems there * * *
>
> The greatest number of problems were in the [pre-bulk shipment] area. We were on a, basically, a manual system [and] * * * the amount of human errors ran quite high.
>
> As an example, we weren't able to produce an alpha listing of our customers with this system. So when payments or returns would come in, many times * * * his return or payment didn't get credited to the account, [74] which in turn then we would continue to dun the person until he wrote back, stating that he had returned or made a payment, * * *
>
> In the area of handling correspondence, we had a problem. * * * There was only one girl working the correspondence * * *
>
> * * * * *
>
> One other point I want to make * * * because [of] the slowness of the system, from the time we would cut off cash or returns until the time we would make our next shipment * * * it would take over, somewhat over two weeks between the cash cut off and the actual shipment of the next volume or—as an example, let's say that a person who had received Volume 1 and had received Volume 2, had now returned Volume 2, which would automatically cancel him for his next shipment. His volume could come in in that two week cut off period and still his third volume would be shipped to him.
>
> * * * * *
>
> * * * [The] problems * * * with the two systems and the people not working together as closely as they should, a payment might come in and go to the [bulk shipment group] but it really should have applied to the [pre-bulk shipment] end of the system and maybe the [former] wouldn't get it over to the [latter] group, so the [pre-bulk shipment] group is dunning the account * * * (See also Finding 108.)

104. Respondent's difficulties with its mail order business were recognized and steps have been taken to correct the problems (RPF VI-14). In August 1973, a fully computerized system was implemented to completely replace the manual system (Harden, Tr. 3604; Collins, Tr. 1577). There had been inadequate management or control of an inadequate number of personnel handling and responding to subscriber billing and correspondence and there were [75] inadequate controls in effect to insure that subscriber inquiries were promptly answered by BHLS (Harden, Tr. 3601). The problems that flowed from these inadequacies were solved by (1) the assignment of additional personnel to these tasks (Harden, Tr. 3601), (2) the imposition of new management controls (Harden, Tr. 3605), and (3) the adoption and implementation of the cathode ray computer terminal equipment (Harden, Tr. 3606-3609). BHLS had inadequate controls in effect to insure that books that were ordered to be shipped by the binderies were in fact shipped (Harden, Tr. 3602). To remedy this inadequacy, shipments of books to subscribers are now made directly from binderies which are physically separate from BHLS, and a specific follow-up system has been instituted to make certain that books are shipped as scheduled (Harden, Tr. 3601, 3609). Because of the time delays of the old manual system, a subscriber's instructions to BHLS would often not be processed in time to be effective. The new computer system, as well as the new procedure, will

undoubtedly reduce these and other problems encountered by BHLS and its 28,000 subscribers. The record does not reflect the actual success of BHLS' recent efforts to minimize billing and shipping errors (Harden, Tr. 3600-3610).

105. By and through advertisements disseminated to induce persons to participate in its continuity programs, BHLS has represented that persons who subscribe to its continuity programs do so without risk or obligation. In fact, once a person subscribes to the continuity programs, BHLS imposes the following duties or obligations on the subscribers: (a) They must notify respondent to prevent shipment of additional books; (b) they must return to respondent all books found unacceptable; and (c) they must pay for all books not returned to respondent. Subscribers also incur the risk that, due to delays in mail delivery or computer error, they will receive unordered merchandise or incorrect billings. Subscribers are also liable for postage on rejection of books and on returned books. Therefore, the representations made by respondent were and are false, misleading and deceptive.

V. Debt Collection Practices

106. BHLS employs a set series of forms in its debt collection procedures (CX 895-965; *see* Joy, Tr. 2973, 2979-2982). The series starts out with a "REMINDER" (CX 921) and continues with a "SECOND NOTICE" (CX 922), two more similar requests for money allegedly due (CX 923, 924), a form that warns that respondent "cannot continue [to] carry [this] account indefinitely in its present condition" (CX 925); another similar warning (CX 926); a stronger [76] warning which states: "Please don't wait until we have to 'take steps' * * *. If we do not hear from you, it will be necessary for us to take immediate action to protect our interests" (CX 927); and a warning that "you are endangering your credit reputation * * *. Do not force us to turn your account over to our attorney" (CX 928). The

series continues with a return envelope with bold printing which reads (CX 929):

> CO-OPERATION COSTS LESS THAN LEGAL PROCEDURE WOULD IT MEET WITH YOUR APPROVAL IF WE ADDED [$75 (CX 1727, 1576)] TO YOUR ACCOUNT BALANCE? THIS AMOUNT IS THE ESTIMATED COSTS FOR PROCESS SERVER'S FEES, COURT COSTS AND OTHER CHARGES, IF LEGAL PROCEDURE IS INSTITUTED IN ORDER TO COLLECT YOUR PRESENT BALANCE. YOU CAN SAVE CONSIDERABLE MONEY AND AVOID EMBARRASSMENT BY PAYING * * * WITHIN FIVE DAYS.
>
> * * * * *
>
> LEGAL PROCEDURE BECOMES A PART OF YOUR PERMANENT CREDIT RECORD.

This notice is followed by a letter under the letterhead of Merchants' Credit Guide Co., stating that Merchants' "issues reports concerning the manner in which individuals pay their just obligations" and giving the debtor an opportunity to pay up "before any unfavorable report is issued" (CX 931), and a letter from BHLS stating that they have approved transfer of the account to "our Attorney," and giving the debtor one last chance to pay before such transfer takes place (CX 930).

107. Customers next receive letters from "James Robert Cox, ATTORNEY AT LAW" (CX 932-935) which state variously that BHLS' collection manager has "instructed me to take some action" and giving the debtor an opportunity to pay and "avoid the possibility of further action and court costs" (CX 932); or that the collection manager has "requested that I immediately * * * file suit in a local court to obtain a judgment * * * for the full [77] balance due * * * plus all court costs. * * * I am proceeding with the preparation of the necessary papers" (CX 933); or that "Unless you contact me * * * within 10 days from today, your account will be processed for suit" (CX 934); or

that "this letter will serve as proof that you have been duly notified of the action pending against you" (CX 935). This is followed by additional letters stating that only if the subscriber makes payment will BHLS "see that Mr. Cox *withholds* legal action" (CX 937), and "the attorney handling your account has advised me that preparatory action has now been completed. Although the matter is out of our hands for some time * * * payment [now] will delay the action long enough to see if we can work this matter out" (CX 938). This series is followed by three more notices which BHLS sends out through the auspices of National Credit, Inc. (Harden, Tr. 3622-23; *see, e.g.,* CX 1800).

108. About one of every five BHLS account holders receives dunning notices (Harden, Tr. 3613-14, 3635). Many of these persons actually receive the entire series of notices and letters on more than one occasion (Harden, Tr. 3619-3621; *see also,* Andersen, Tr. 2710-2733). A number of subscribers received merchandise even after they had cancelled their subscriptions (Warshaw, Tr. 2688-2689; Beaman, Tr. 1914-15; Dollins, Tr. 2443; Nickelsberg, Tr. 2661-62). Several customers received billings and dunning letters for unordered merchandise (Beaman, Tr. 1915, 1923-24; Dollins, Tr. 2443-44; Nickelsberg, Tr. 2670-71; Warshaw, Tr. 2689-2691); *see also,* Andersen, Tr. 2704-2713), while some received billings and dunning letters where they had never accepted BHLS' continuity offer, nor requested any merchandise (Windsor, Tr. 2628-2630). A number of witnesses testified that, despite their efforts to rectify a clearly erroneous situation, they were still subjected to unrelenting mailings of billings and dunning letters (Beaman, Tr. 1924-1935; Windsor, Tr. 2632-36; Dollins, Tr. 2443-44; Warshaw, Tr. 2688-2691, 2696-98; Nickelsberg, Tr. 2657-2680; Andersen, Tr. 2698-2751).

109. The record shows that EB employs many of the same debt collection methods as BHLS when attempting to induce payments of accounts from its customers (Respondents' Answer,

Par. 14; CX 1630-1638, 1645-1660, 1683-1720; Joy, Tr. 2973). According to Mr. Dru, EB's official in charge of debt collection (Tr. 3647-48): [78]

> An account would come off of the computer * * * It would go to the regional office handling the account * * * where * * * a collection correspondent * * * would manually dun the account by form letter weekly * * *.
>
> * * * We would make approximately four phone calls on him * * * and we would hold it in that office for about 90 days. At the end of 90 days, that office would transfer the account to * * * Chicago, and * * * they would send out three forms for a period of 90 days, and if the customer did not respond, then * * * it would be transferred out to a collection agency.

During the 90-100 days while in the Regional Collection Office, EB would manually dun customers with approximately 18 letters, including four on the letter heads of attorneys. The accounts are retained for 90 days and are then transferred to an outside collection agency approximately 240 days after the account is kicked off the computer. While "some" of the accounts are transferred to a collection agency, small balance accounts and others are coded-out and abandoned (Dru, Tr. 3658-3662).

110. EB maintains approximately 150,000 open accounts, of which approximately 25,000 are dunned in a sequence of letters such as the following (Dru, Tr. 3654): A reminder (CX 1645-1646); a form that adds "* * * *in order to avoid the payment of additional interest*" (CX 1647); two reminders (CX 1648-1649); a form which states that prompt payment will avoid "assessing *additional interest charges*" (CX 1650); a reminder (CX 1651); a form stating that "We cannot continue writing you without response, nor can we carry your account indefinitely in its present condition" (CX 1652); a form stamped "FINAL NOTICE" which warns that "* * * you do not want to jeopardize your credit standing" (CX 1653); one which threatens "* * * you are forcing us to proceed with collection by other methods. Why not avoid embarrassment and expense

* * *" (CX 1654); letters such as CX 1656 ("* * * we needn't remind you of the legal significance of your signature on the sales contract you signed") and CX 1657 ("We must take the actions previously indicated * * * to enforce our rights * * * you may expect us to proceed"); threats of garnishments (CX 1685); threats of [79] legal action and court costs (CX 1686) and sheriff's sales (CX 1687); a series of letters from respondent's Collection Manager, CX 1689 ("* * * why * * * risk the resulting legal action?"), CX 1690 ("* * * save yourself considerable money in legal costs * * *") and CX 1691 ("Unless * * * payment is received within 5 days, we will have no alternative but to authorize our attorney to take JUDGMENT against you. This may result in your employer being served with GARNISHMENT DEMANDS"), along with letters threatening "to employ drastic collection measures which might prove costly and embarrassing * * *" (CX 1695) and "to proceed with the collection of your account by whatever means * * * necessary" (CX 1697); two letters on the letterhead of Merchants' Credit Guide Co., which threaten customers that their name will "* * * appear in legal records and trade reports as having been sued for collection of a past due account" (CX 1718); letters on the letterheads of Attorney Samuel D. Neidorf or Attorney Louis J. Victor, which state "Encyclopaedia Britannica has * * * instructed me to take action * * *. To avoid the possibility of legal action and court costs—[make payment within five days]" (CX 1630; *see also*, CX 1635), "* * * I will be compelled to collect the entire balance of the debt without regard to the burden which a lump sum payment might place upon you" (CX 1633), "I will have to advise my client that your debt cannot be collected short of a lawsuit. * * * THIS IS FINAL NOTICE BEFORE SUIT" (CX 1634; *see also*, CX 1636, 1638); and a letter claiming that "This is our FINAL DEMAND FOR PAYMENT: Exactly one week from today we are closing your file and forwarding it to our attorney with instructions to file suit. * * * This is your last chance to avoid court action" (CX 1698).

111. Respondents have a contractual relationship with attorneys whose letterhead stationery is used for the collection series (CX 2008, 966; Victor, Tr. 1342; Pixler, Tr. 1364; Cox, Tr. 1376-77). The attorneys approve the language of the form letters (Victor, Tr. 1343-44; Pixler, Tr. 1366; Cox, Tr. 1376), and respondents mail them to the accounts and sign the attorney's name to them (Victor, Tr. 1350-51; Pixler, Tr. 1366; Cox, Tr. 1378; CX 966, 2008-C). Respondents assume all operating costs such as mailing, phone calls and stationery (CX 966). Responses to the letters, which are sent directly to the attorneys, are immediately forwarded directly to respondents (CX 2008-C; Victor, Tr. 1357-58; Cox, Tr. 1385; Pixler, Tr. 1366). The attorneys make no legal recommendations regarding the delinquent accounts, do not [80] file suit against such accounts, and are not authorized by respondents to bring suit in any court against any such accounts (CX 2008; Victor, Tr. 1360-61; Pixler, Tr. 1372; Cox, Tr. 1380-81). It is the corporate policy of respondents not to bring suit once they have exhausted their entire debt collection series and a corporate representative could recall no case of a lawsuit to collect money allegedly owed to respondents (Dru, Tr. 3668). Respondents' representations to the contrary are, therefore, false, misleading and deceptive.

CONCLUSIONS

RECRUITING PRACTICES

Paragraphs Five and Six of the complaint charge EB with deceptive acts or practices in connection with recruiting advertisements placed in newspapers of general circulation. It is alleged that these advertisements contain deceptive statements and misrepresentations concerning the (1) types of positions being offered, (2) availability of management training, (3) guaranteed monthly incomes, and (4) duties to be performed by the persons engaged by respondents, *i.e.*, to contact persons in their homes primarily for advertising or other non-selling

purposes. While not specifically alleged in the complaint as a violation of Section 5, complaint counsel have proposed numerous findings concerning respondent's use of "blind" recruiting advertisements—advertisements which do not disclose either the name of the company offering the position, the type of position being offered, or the product involved (CPF II-12-26). Respondent has likewise proposed findings on the use of such "blind" advertisements (RPF II-1).

The record establishes beyond dispute that EB engages in extensive use of newspaper advertisements for the purpose of recruiting personnel to engage in the door-to-door[1] [81] sale of its products and services. The advertisements which are utilized for recruiting purposes are approved by EB's corporate officials for use by its local offices throughout the country. Recruiting advertisements are placed in daily newspapers of general interstate circulation such as the *New York Times, Washington Post, St. Louis Post-Dispatch,* and *Philadelphia Inquirer* (Finding 9). These recruiting advertisements generate thousands of inquiries each year (Finding 9), and recruitment of salesmen is an important aspect of respondent's business operation (Finding 9).

The record is manifestly clear that EB makes substantial use of blind recruiting advertisements; in fact, most of its salesmen are recruited through the use of such advertisements. (Findings 10-12). Persons responding to blind recruiting advertisements

1. Respondent contends that it is not engaged in the door-to-door sale of products (RB, p. 25; RRF, p. 3). It is respondent's contention that it is engaged in the sale of products in the home (RPF II-I), and that its salesmen do not canvass door-to-door but instead follow "leads" or inquiries from prospective customers (RPF, p. 3). This argument is rejected. The bulk of EB's sales are made door-to-door, as that term is defined in the Commission's Trade Regulation Rule Concerning a Cooling-Off Period for Door-to-Door Sales (Findings 6, 20, 68). Respondent's primary reliance on "leads," many of which are nothing more than the name of an individual [*i.e.,* baby leads, or names of individuals who have recently moved into a community], and on telephone appointments in contacting prospects in their homes, does not convert respondent's method of doing business from a basic door-to-door sales operation.

by contacting the telephone number listed in the advertisement are given no information over the telephone. All information concerning the position, company and product is withheld until after applicants have kept an appointment and have taken certain initial screening tests (Findings 15-16).

Respondent also employs advertisements which affirmatively misrepresent the position being offered. Some such advertisements state that the position offered is *not* in [82] door-to-door sales. Some advertisements represent that the position being offered is in management, administration, public relations, or sales promotion (Findings 18, 19). Other advertisements state that the position being offered is in marketing, or the position is that of an instructor or demonstrator, and it involves interviewing families and delivering information (Finding 19).

Respondent widely utilizes advertisements offering management training or executive sales training (Findings 21-23). Respondent also places heavy reliance on advertisements which offer guaranteed incomes ranging from $500 to $1,000 per month (Finding 25). The guaranteed income advertisements specify that the applicant must meet respondent's "requirements," with no time limitation placed on the guaranteed income. Many of the advertisements offering guaranteed income and management training are blind advertisements; some such blind advertisements offer both management training and guaranteed income (CX 5-V, 35).

The record establishes that respondent's advertisements are for the purpose of recruiting salespersons to engage in the door-to-door sale of its products and services (Findings 20, 24). EB does not have a management training program and few, if any, applicants are actually offered management trainee contracts (Finding 24). Further, applicants are discouraged from accepting guaranteed income contracts, and those applicants who do sign guaranteed income contracts seldom, if ever, receive the guaranteed incomes (Findings 27-29). Applicants, who forego guaranteed income contracts for what is represented to be a

better arrangement under respondent's regular commission contracts, do not earn and cannot reasonably expect to earn commissions as great as the advertised guaranteed income.

There is obvious deception where respondent misrepresents the type of position being offered and the amount of compensation that will be guaranteed. Several witnesses testified that they were most attracted to the advertisements by the promise of a substantial guaranteed income (Finding 25). Promises of management training where none exists likewise has the capacity to deceive, especially for persons who are interested in advancement (Finding 22).

It is equally deceptive and unfair for respondent to fail to disclose in its recruiting advertisements the nature [83] of the position being offered. Respondent admits that the purpose of running advertisements which fail to disclose the true nature of the position offered is to attract that segment of the job-seeking public which is composed of persons who would not respond to an advertisement offering positions in door-to-door sales (RPF II-1).[2] If "blind" advertisements attract persons who would not have responded to such advertisements had they known the true nature of the position offered, it follows that persons, who do decide to respond, believe that the position being offered is one which they may desire. Thus, respondent has knowingly and intentionally misled and deceived such persons through its advertisements.

Respondent contends that the advertisements are not deceptive because the witnesses, who testified in this proceeding about "blind" advertisements actually accepted the sales position that was offered (RRM, pp. 4-5). This argument is not only legally invalid since the initial contact was made through deception, it completely ignores the thousands of persons who made inquiry because of the deception but turned down the position.

2. "Blind" advertisements are not necessary to respondent's business. The record shows that open advertisements are successful in recruiting salesmen (Finding 14).

It is clear that the deception fostered by respondent's "blind" advertisements is successful in bringing persons to respondent's offices who would not have come if they had known that the position offered involved door-to-door selling, which is the admitted reason respondent uses blind advertisements. Therefore, such advertisements have the tendency and capacity to deceive a substantial number of potential job applicants, and to cause applicants to invest time, energy and money in investigating job opportunities in which they would not otherwise have been interested.

One additional factor regarding the deceptiveness and unfairness of respondent's recruiting advertisements should be emphasized. Advertisements offering employment opportunities are directed at a particularly susceptible segment of the population —the unemployed. Advertisements offering [84] guaranteed income and management training, if misrepresented, have a substantial capacity to deceive. It is also manifestly unfair and deceptive to cause persons to invest time, energy and money and go through an appointment and interview before learning such basic and threshold information as the nature of the position being offered, especially where the position—door-to-door sales—is one which admittedly most persons do not desire and would not otherwise investigate.

The Commission has repeatedly held over the years that it is a violation of the Federal Trade Commission Act to misrepresent to potential salespersons the nature of the position offered and the amount of compensation that will be received. *Educators Ass'n, Inc.* v. *Federal Trade Commission,* 108 F. 2d 470 (2d Cir. 1940); *Goodman* v. *Federal Trade Commission,* 244 F. 2d 584 (9th Cir. 1957); *American Marketing Associates, Inc.,* 73 F. T. C. 213 (1968); *see also, Crowell Collier and Macmillan, Inc.,* 82 F. T. C. 1292 (1973). It is equally well settled that failure to disclose material facts is a violation of the Federal Trade Commission Act. *All-State Industries of North Carolina, Inc.* v. *Federal Trade Commission,* 423 F. 2d 423

(4th Cir. 1970); *Portwood Co.* v. *Federal Trade Commission,* 418 F. 2d 419 (10th Cir. 1969). As the District of Columbia Circuit Court of Appeals stated in *Tashof* v. *Federal Trade Commission,* 437 F. 2d 707, 714, fn. 37 (1970):

> * * * we have long since passed the point where the power of the Commission to reach statements that are deceptive because they contain less than the whole truth can be doubted.

Further, the law is violated if the first contact or interview is secured by deception, even though the true facts may be made known at a later date. *Carter Products, Inc.* v. *Federal Trade Commission,* 186 F. 2d 821 (7th Cir. 1951).

Jurisdiction Over Recruiting Practices

Respondent takes the position that Section 5 of the Federal Trade Commission Act does not extend to EB's recruiting practices because (1) they are not "trade practices"; (2) such practices are inherently local in nature, and thus are not a part of interstate commerce (RM, pp. 18-25).

[85] EB argues that recruiting is not a trade practice engaged in by respondent acting as a "trader," rather, the act of recruiting is properly viewed "in isolation" from the trade process. EB contends that the activity of recruiting, like the activity of bargaining with employees, arbitrating disputes with employees, or funding pensions for employees, is distinct from the business of producing, transporting, promoting, and selling encyclopedia—that is, it falls under the heading of labor relations or fair employment practices. It is wholly collateral to trade. It is divorced from the competitive process, and the process of distribution to consumers, the twin processes which Congress sought to regulate by means of Section 5.

Respondent further argues that its recruiting practices are inherently local in nature. EB's district managers place advertisements in local newspapers, those who respond are given

community job assignments, subject to the supervision of the district manager, and the employment contracts involved specifically limit the area in which the new recruit is allowed to solicit sales. Thus, respondent argues, in sum, that these local activities transform respondent's interstate operations into myriads of local businesses that only by a very oblique kind of reasoning can be construed as in or part of interstate commerce.

Respondent relies upon three previous decisions to support its arguments: *Federal Trade Commission* v. *Bunte Bros.,* 312 U. S. 349 (1941); *Scientific Mfg. Co.* v. *Federal Trade Commission,* 124 F. 2d 640 (3rd Cir. 1941); *Progress Tailoring Co.* v. *Federal Trade Commission,* 153 F. 2d 103 (7th Cir. 1946). None of these decisions are dispositive of these issues raised by respondent.

The decision in *Bunte Bros.* was concerned with an Illinois candy manufacturer selling candy *only* in Illinois. The Commission argued in that proceeding that it may proscribe unfair practices used in intrastate sales when these result in a handicap to interstate competitors. The Court, in ruling against the Commission, held that it could not read " 'unfair methods of competition in [interstate] commerce' " as though it meant " 'unfair methods of competition in any way affecting interstate commerce' " (*Id.* at 355).

[86] The facts in the present matter differ significantly from the facts in *Bunte Bros.* EB is a national concern selling encyclopedia throughout the United States. Deceptive recruiting advertisements are used throughout the United States. Although the actual advertisements are placed by local offices of respondent, they originate at corporate headquarters, and must be approved by corporate officials prior to use by local offices. After approval by corporate headquarters and dissemination to local offices for use, the advertisements are placed in scores of newspapers having substantial interstate circulation (such as the *Boston Globe, New York Times, Washington Post, Chicago Tribune, St. Louis Post-Dispatch, Denver Post, Los Angeles Times*). Weekly re-

ports are submitted to corporate headquarters evaluating the success of advertisements placed in each newspaper, and respondent relies upon salesmen recruited through such advertisements to market and sell its products nationwide.

Characterizing newspapers in which respondent's advertising appears as "local" does not detract from the fact that these same newspapers maintain substantial circulation in interstate commerce. Jurisdiction may rest solely on interstate dissemination of the deceptive advertisements; a showing of interstate recruitment of salespersons is not essential. *S. Klein Dept. Stores, Inc.*, 57 F. T. C. 1543 (1960); *accord, Bankers Securities Corp.*, 57 F. T. C. 1219 (1960);[3] and *Surrey Sleep Products, Inc., et al.*, 73 F. T. C. 523 (1968).

Further, respondent cannot isolate the practices of local offices from its interstate operations. Respondent's recruiting activities are an integral part of its distribution system as is obvious from the following:

(1) Respondent recruits salesmen who sell its products throughout the United States;

[87] (2) respondent designs and creates all recruiting advertisements containing the misrepresentations and deceptions;

(3) recruiting is conducted by agents and employees of respondent;

(4) respondent's success in the sale and distribution of its products is due largely to its success in recruiting salesmen; and

(5) respondent's success in recruiting is due primarily to its reliance upon corporate materials which contain misrepresentations and deceptions.

In *Ford Motor Co.* v. *Federal Trade Commission*, 120 F. 2d 175 (6th Cir. 1941), *cert. denied*, 314 U. S. 668 (1941), the facts involved false advertising as to financing of automobiles

3. In *Bankers Securities Corp.*, 57 F. T. C. 1219, 1224, the Commission held that it is appropriate to take official notice of the fact that a well known metropolitan newspaper is distributed outside the state in which it is published.

purchased from local Ford dealers. Ford, relying upon *Bunte Bros., supra*, contended that the alleged violative practices were not in commerce within the meaning of Section 5 of the Federal Trade Commission Act since Ford had sold the cars to its dealers and the practices pertained solely to a purely intrastate transaction, *i.e*, dealers' sales to consumers. The Circuit Court rejected Ford's contention holding:

> The sale on credit of petitioner's cars by its local dealers, when separately considered, may be intrastate in character but when the activities of petitioner's local agencies are weighed in the light of their relationship to the petitioner, and its financing sales of cars, it is at once apparent that there is such a close and substantial relationship to interstate commerce that the control of such activities is appropriate to its protection. (*Id.* at 183.[4])

[88] The facts in the present matter are stronger than in the *Ford* case, since the Ford dealers were independent agents and not employees as are the officials of respondent's local offices. Thus, it is apparent that respondent's recruiting activities are an integral part of its interstate business operations and cannot be separated therefrom. There is such a "close and substantial relationship" between respondent's local offices and its interstate business operations generally that the recruiting activities are within the jurisdictional ambit of Section 5 of the Federal Trade Commission Act.

EB's contention that its recruiting practices are wholly collateral to its selling practices and therefore not subject to the jurisdiction of Section 5 of the Federal Trade Commission Act must also be rejected. *Scientific Mfg. Co.* v. *Federal Trade Commission, supra*, cited by respondent, is not in point. In *Scientific Mfg. Co.*, the respondent published and disseminated a booklet concerning the use of aluminum cooking utensils; it was not

4. *See also, Holland Furnace Co.* v. *Federal Trade Commission*, 269 F. 2d 203, 212 (7th Cir. 1959), *cert. denied*, 361 U. S. 932 (1960); *accord, Atlantic Refining Co.* v. *Federal Trade Commission*, 344 F. 2d 599, 607 (6th Cir. 1965) *cert. denied*, 382 U. S. 939 (1965).

engaged in the sale of utensils, nor financially interested in the sale of such articles.[5] Also inherent in the Court's decision was the right of "free speech" under the First Amendment to the Constitution. The Court stated:

> * * * the present petitioners not being engaged or materially interested in the cooking utensil trade, the Commission was without power to enjoin their sale and distribution of the pamphlets which they published concerning the use of aluminum cooking utensils and, further, that the publication, sale, and distribution of matter concerning an article of trade by a person not engaged or financially interested in commerce in that trade is not an unfair or deceptive act or practice within the contemplation [89] of the Federal Trade Commission Act, as amended, if the published matter, even though unfounded or untrue, represents the publisher's honest opinion or belief. (*Id.* at 644.)

It is amply clear that respondent's recruiting activities directly affect its trade in products and services and therefore cannot be viewed as "collateral" to its selling activities. The commercial significance of respondent's recruiting advertisements, as well as the clear monetary benefits which respondent gains from such advertisements, squarely takes this case out of the holding in *Scientific Mfg. Co.*, and places respondent's recruiting activities within the Commission's jurisdiction under Section 5 of the Federal Trade Commission Act.

In *Progess Tailoring Co.* v. *Federal Trade Commission,* 153 F. 2d 103 (7th Cir. 1946), the petitioner's challenge rested on the premise that the advertisements for salesmen did not constitute interstate commerce and thus the Commission lacked jurisdiction. The Court rejected this argument based on the circumstances that employment offers were made only to secure purchasers for the sale of the said petitioner's merchandise. However, the Court did not, as respondent contends, hold that

5. When a respondent *selling* cooking utensils utilized the booklets which were the subject of the *Scientific Mfg. Co.* proceeding, the Commission properly enjoined such practice. *Perma-Maid Co.* v. *Federal Trade Commission,* 121 F. 2d 282 (6th Cir. 1941).

jurisdiction over recruiting practices will only atta h where the advertisements soliciting the salesmen are designed to sell merchandise to the applicant for the job. There is no wording in the opinion which limits the jurisdiction of the Commission over recruiting practices to the facts in the *Progress Tailoring* matter.

The undersigned has not located any proceeding in which it has been specifically determined that the Commission has jurisdiction over recruiting advertisements; the distinct issue apparently has never been directly raised heretofore. The Commission has determined in the past, however, that it has power under Section 5 to regulate misrepresentations in recruiting practices, and has, in fact, consistently exercised such power. As early as 1939, the Commission ordered a company, which used false and misleading newspaper advertisements to recruit persons for the door-to-door sale of reference books, to cease and desist from:

> [90] Representing to prospective representatives that they will refund deposits or pay any specific sums of money or salaries to such representatives until and unless they fully and adequately disclose all of the terms and conditions upon which refunds or payments are actually made. *Educators Association, Inc.* v. *Federal Trade Commission,* 108 F. 2d 470, 472 (2d Cir. 1939; *Reh. denied,* 110 F. 2d 72 (2d Cir. 1940); *Mod.* 118 F. 2d 562 (2d Cir. 1941)).

As early as 1940, the Commission published a trade practice rule to prohibit the very types of recruitment practices demonstrated by this record. 16 C. F. R. §§ 150.14, 150.15; 5 F. R. 3506 (Sept. 4, 1940). In its rule, the Commission determined that it is "an unfair trade practice to secure or attempt to assure the services of any person as agent, canvasser, solicitor, or other sales representative [in the sale or distribution of books] by means of misleading or deceptive representations with respect to amounts guaranteed or offered such representatives, or by any other such unfair means" (16 C. F. R. § 150.15). While such guides did not have the force and effect of law, they were, at a minimum, efforts to educate and lead the industry, and clearly indicated Commission concern at deceptive recruiting practices.

The Commission's determination to continue to exercise jurisdiction over recruiting practices is evidence by the litigated order in *American Marketing Associates, Inc.*, 73 F. T. C. 213 (1968). There the Commission, without additional written opinion, summarily affirmed the hearing examiner's findings, but redrafted his order "to prohibit, in clear and specific terms, the unlawful acts and practices in which the record establishes that respondents have engaged" (*Id.* at 262). The Commission drafted the following prohibitions, among others, which required the respondent to cease and desist from representing, directly or by implication, that:

> Jobs are available or applicants are sought as trainees for junior executive positions in market research and analysis, advertising credits, public relations, personnel supervision or management; or misrepresenting, in any manner, the type or kind of employment offered;
>
> [91] A salary or income is being paid for any job or position when only a commission is paid to those accepting the employment; or misrepresenting, in any manner, the amount or method of compensating employees; (*Id.* at 263).

This order constitutes clear and convincing evidence that it has continued to be the Commission's view that unfair and deceptive recruitment practices are in violation of Section 5 and it is empowered to take decisive action in regulating such practices. No decision of the Commission casts any doubt on its position in *American Marketing*, and no Federal court has held, or even suggested, that its position is wrong on jurisdictional grounds.

It is beyond dispute that the Commission has determined through repeated regulatory actions that recruitment practices constitute unfair or deceptive acts or practices under Section 5 of the Federal Trade Commission Act. The courts have given great weight to an agency's construction of its own enabling legislation. *Udall* v. *Tallman*, 380 U. S. 1 (1965); *United States* v. *American Trucking Ass'n*, 210 U. S. 534, 549 (1940).

Aside from previous Commission determinations, there are several bases for asserting Commission jurisdiction over respondent's recruiting practices. It has previously been concluded that respondent's recruiting practices are an integral part of its interstate business operations and are vital to respondent's ability to sustain a sales force and to thus maintain a course of trade and commerce in the sale and distribution of encyclopedias. It would be particularly inappropriate to single out recruitment as not being a part of respondent's overall trade practices. To take respondent's argument to its logical conclusion would require that collection practices also be separated and eliminated from consideration as a trade practice; so too, perhaps, would be the use of "door openers." Accordingly, the Commission has jurisdiction over the deceptive recruiting advertisements.

The Commission in this proceeding is not challenging the salaries or commissions to be paid to employees, the hours to be worked, or the territories to be covered; the Commission's challenge is limited to deceptive advertising of business opportunities that are available [in the form of [92] salemen's positions]. This is a trade practice, not regulation of actual employment terms and conditions. Statutes governing labor relations and fair employment practices in no way limit the Commission's jurisdiction over advertising of employment opportunities.

Respondent's argument that the challeged practice must, *itself*, be a "trade practice" (RM, p. 21) seems bottomed upon the argument that a sale of a product or service must be *directly* involved in the particular practice which is challenged. Numerous precedents establish that an actual sale need not be established. In the *S. Klein* case, *supra*, the Commission determined that mere interstate dissemination of a deceptive advertisement conferred jurisdiction upon the Commission. The Commission has condemned numerous other business practices where no sale of a product or service was *directly* involved; *i.e.*, collection practices, threats to sue, commercial bribery, inducing breach of contract, harassment of competitors, stealing competitors' trade

secrets, enticing away competitors' employees, furnishing deceptive means and instrumentalities to others, misrepresenting business status, disparagement of competitors, payola, and misrepresenting business earnings and employment opportunities. The language of Section 5 declares, *inter alia,* that "unfair or deceptive acts or practices in commerce" are unlawful. The Act does not speak of "trade"; nor does it speak of the *sale* of a commodity or service.

There is a further basis upon which Commission jurisdiction may be asserted. Respondent's recruiting advertisements are an offer of a business opportunity. Some of the advertisements promise management training; others offer a guaranteed income for an unspecified period of time. These are offers of business opportunities, in effect the offer of a license to sell respondent's products and services. Some such offers are accepted, and thus a "sale" has been consummated. The Commission has for some time concerned itself with misrepresentations and deceptions in the advertising of franchises, and has proposed a trade regulation rule concerning franchising (*Disclosure Requirements and Prohibitions Concerning Franchising,* 36 F. R. 21607). Respondent's job offers are quite similar to franchising.

The Commission has broad authority to protect the public against unfair practices, as noted in the Commission's opinion in *All-State Industries of North Carolina, Inc.,* 75 F. T. C. 465, 491 (1969):

> [93] * * * [the Commission] is charged not only with preventing well-understood, clearly defined, unlawful conduct but with utilizing its broad powers of investigation and its accumulated knowledge and experience in the field of trade regulation to investigate, identify and define those practices which should be forbidden as unfair because contrary to the public policy declared in the Act.

This broad authority has been recently confirmed by the Supreme Court in *Federal Trade Commission* v. *Sperry & Hutchinson Co.,* 405 U. S. 233 (1972). The public to whom respondent's recruiting misrepresentations and deceptions are

directed is entitled to the protection of the Federal Trade Commission Act. At any one time respondent employs between 1,500-2,000 sales representatives. During the period 1969-1971, approximately 10,000 such persons were employed (RPF III-6). The Commission can and should exercise jurisdiction over respondent's recruiting misrepresentations and deceptions.

SELLING PRACTICES

Paragraphs Seven and Eight of the complaint allege that EB, through promotional materials and oral representations, has misrepresented (1) the purpose of its salesmen's contacts with persons in their homes, (2) that EB is offering merchandise and services free of charge to prospective purchasers in return for certain cooperation from the purchasers, (3) that purchasers of EB's products and services will realize significant savings, (4) that sales representatives will utilize only a few minutes inside prospects' homes, (5) that EB's Library Research Service will provide answers to any questions and that such answers will be the product of detailed, exhaustive and original research. Paragraph Nine of the complaint alleges that EB conducts various contests and utilizes other promotional devices for the purpose of obtaining leads to prospective purchasers of its products and services without informing persons, who respond to such devices, that they will be subject to a lengthy sales presentation. [94]

Initial Contact with Consumers

The primary means by which EB sells its products and services is through the door-to-door solicitation of consumers (Finding 39). It is essential to respondent's business that its salespersons gain admission to prospects' homes in order to make a sales presentation (Balzano, Tr. 1542). EB's salesmen utilize numerous devices which disguise the purpose of the salesman's initial contact with prospects—devices which essentially are ruses for gaining admission into prospects' homes "not in

the role of a salesman" (CX 648-E). These devices are approved by EB's management, are made available to its salesmen, and the salesmen are trained by EB to effectively use such devices (Findings 39-51).

One ploy used to gain entrance into prospects' homes is the Advertising Research Analysis questionnaire. This form questionnaire is designed to enable the salesman to disguise his role as a salesman and appear as a surveyor engaged in advertising research. EB fortifies the deception created by the questionnaire with a form letter from its director of advertising (CX 648E-F) for use with those prospects who may question the survey role. These questionnaires are not good faith advertising research surveys; many of the questionnaires are thrown away by salesmen without being analyzed for any purpose whatsoever (Findings 40-45).

Other devices used by EB's salesmen are free booklets, vacation certificates, and other prizes. Salesmen are trained to approach prospects' homes in the guise of delivering such gifts or prizes without identifying themselves as salesmen, or that the purpose of their visit is to sell encyclopedia (Findings 48-52). A former executive of EB's Compton's Division testified (Balzano, Tr. 1531):

> Q. Do I understand you to say you counsel your sales representatives not to reveal the purpose of their selling books at the door initially?
>
> A. Absolutely.

One of the principal methods which EB employs to establish appointments at the homes of prospects is the use of "telephone talks" prepared by EB for the use of [95] its salesmen. While the caller does identify himself as being with Encyclopaedia Britannica, the approved language of the "talks" is designed to convey the impression that the purpose of the caller's requested visit is *only* to deliver a gift or prize, or to certify a gift certificate (Findings 46-47). EB's salesmen are provided with "door approach" language designed to reinforce the "telephone talk" to conceal the true purpose of the salemen's visits (Finding 46).

EB employs contests and contest entry cards and makes extensive use of magazine advertisements and direct mail brochures to obtain "leads" or names of persons to contact (Finding 84). None of the contest entry cards, magazine advertisments or mail brochures discloses that a salesman will call. In fact, the mail brochures and magazine advertisements indicate all information will come by mail direct from the publisher. Contest entry cards indicate there is no obligation and winners will be notified by telephone (Findings 85-86).

Thus, the record is clear that EB's sales representatives misrepresented and failed to disclose the purpose of the initial contact with prospects. These practices were authorized and condoned by EB. Such misrepresentations and deceptions are neither novel nor lawful. Similar practices have been declared unlawful by the Commission over the years, most recently in *The Crowell-Collier Publishing Company*, Dkt. 7751, 70 F. T. C. 977, 1012, 1021-22, 1026 (1966).

In-Home Representations

Respondent's salesmen are trained to make a presentation of a "Cooperative Plan" after gaining entrance into the homes of prospects. Under the terms of the "Cooperative Plan," a number of items are represented to be "given" free of charge, or at "no charge" in return for cooperation by the purchaser (Findings 54-59). The alleged cooperation was neither required nor obtained from purchasers in many instances (Findings 60-62). In making the presentation, salesmen were trained to use so-called "retail" prices for the items included in the "Cooperative Plan," *i.e.*, the encyclopedia set and the items included in the Plan at "no charge." In many instances, EB's salesmen write down on pieces of paper or brochures the "retail" prices in order [96] to graphically demonstrate the savings which the prospect will realize under the "Cooperative Plan" (Findings 63-67).

The claimed "retail" prices employed by the salesmen are not the prices at which substantial sales of such products have been

made by respondent (Finding 68). In fact, EB's salesmen are trained to make only a "Cooperative Plan" presentation, and are not permitted to sell individual items at retail prices (Finding 59). Some of the items in the "Cooperative Plan" are available only through the "Cooperative Plan" and are never sold at retail. None of the merchandise is "given" for cooperation; all merchandise and services are sold as part of a package plan.

Although some sales of some items have been made at retail prices, it is clear that the sales presentation which respondent's salesmen are trained to make in the home is a misrepresentation and a deception. The presentation is designed to mislead the purchaser into believing he is receiving a package plan at a substantial savings when in actual fact this is respondent's regular offer to consumers. There are no savings, no merchandise is given free of charge, and no merchandise is "earned" by cooperation from the purchaser.

Respondent's standard "Cooperative Plan" presentation emphasizes that the plan must be accepted immediately. National magazine advertisements also state that the "Cooperative Plan" is a limited offer. The emphasis on immediate acceptance lends credence to respondent's representation that the "Cooperative Plan" is a special price which represents substantial savings (Findings 70-71).

EB's salesmen also represent that they will take only a few minutes of time to complete their visit in a prospect's home. If the salesman is permitted to give a sales presentation, the visit requires at least an hour, and sometimes a much longer period of time is involved (Findings 73-75).

During the course of the sales presentation, representations are made orally by salesmen and in brochures concerning EB's Library Research Service which is included in the "Cooperative Plan." Library Research Service answers questions from purchasers of Encyclopaedia Britannica and Great Books. Purchasers receive 100 coupons, each of which [97] may be used to obtain a report on topics included in a basic catalogue or to

obtain a special report on topics not included in the catalogue. EB's salesmen represent to prospects that Library Research Service will provide information on any subject with the only exception being legal and medical advice. It is also represented that the reports will be similar or identical to college term papers in form and content (Findings 76-78).

The evidence reveals that there are numerous other conditions and limitations to the Library Research Service. There are numerous types of questions which Library Research Service will not supply answers thereto. Further, in some instances, answers provided by Library Research Service are not the product of exhaustive, original research, are not in the form of a college thesis, and are not responsive to the questions asked. Most of the reports furnished by Library Research Service are standard reports on topics listed in the Library Research Service catalogue (Findings 79-83).

Again, respondent's misrepresentations and deceptions concerning "cooperation" from the purchaser, the "free" or "no charge" merchandise, "retail" prices, the "savings" to be realized through the "Coopertive Plan," the "limited" duration of the offer, and the length of the sales visit are not novel or lawful. These same practices, with slight variations, were condemned in *The Crowell-Collier* matter, *supra*, at pp. 1022-1024. *See also, Basic Books, Inc.* v. *Federal Trade Commission*, 276 F. 2d 718 (7th Cir. 1960); *Standard Educators, Inc.* v. *Federal Trade Commission*, 475 F. 2d 401 (D. C. Cir. 1973); *American Marketing Associates, Inc.*, 73 F. T. C. 213 (1968); *Federal Trade Commission* v. *Mary Carter Paint Co.*, 382 U. S. 46 (1965); and *Sunshine Art Studios, Inc.* v. *Federal Trade Commission*, 481 F. 2d 1171 (1st Cir. 1973).

Respondent's misrepresentations concerning the Library Research Service concern the scope of questions that will be answered, and the type and quality of the reports. Previous Commission decisions concerning encyclopedia sales have determined that such misrepresentations are unlawful. *Consolidated Book Publishers, Inc.* v. *Federal Trade Commission*, 53 F. 2d

942 (7th Cir. 1931); *see also, Standard Distributors, Inc.*, 48 F. T. C. 1435, *aff'd.* 211 F. 2d 7 (2d Cir. 1954). Further, misrepresentations concerning the quality, content [98] or characteristics of products being sold are manifestly unfair and deceptive and have long been held to be in violation of the Federal Trade Commission Act (see CCH *Trade Reg. Rep.*, Vol. 2, ¶ 7593-7619).

Lead-Getting Activities

EB's magazine and direct-mail advertisements as well as contest entry cards, used to obtain the names of persons who will be contacted by EB's salespersons for the purpose of persuading such persons to purchase EB's products, do not disclose the fact that persons who respond will be contacted by EB's salespersons. The Commission has held that failure to disclose the material fact that responses to advertisements will be followed up by a salesperson is a violation of the Federal Trade Commission Act. *Mather Hearing Aid Distributors, Inc.*, 78 F. T. C. 709 (1971).

Respondent contends (RRM, p. 7) that the facts on *Mather* are somewhat different than in the present matter, different in respect to the nature of Mather's product and the age and susceptibility of prospective customers. Respondent also points out that EB's salesmen usually telephone prospects prior to visiting them personally. These fact differences do not change the basic deception inherent in EB's methods. EB's magazine advertisements affirmatively mislead the public into believing that all materials and information will come by mail—direct from the publisher (Findings 84-85). Some of the contest entry cards indicate EB is giving away prizes in celebration of its 200th anniversary, that there is no obligation in filling out a card (CX 754-756).[6]

The *sole* purpose of these activities is to obtain leads to prospects. The only way to protect the public, to correct the misrepresentations in respondent's lead-getting activities, is to in-

6. Interestingly, every contestant wins a prize—a consolation prize (Findings 47-49; Morse, Tr. 2400).

form the public of the true motives behind respondent's offers of free information and prizes—that respondent has a profit motive and will seek to sell its products to those who respond to its devices. These are material facts the public should know. Disclosure that a salesman may call to make a sales presentation of respondent's products and services [99] will correct respondent's misrepresentations and make these material facts available to the public.

BHLS' Mail Order Program

BHLS' advertisements and promotional materials which solicit participation in its continuity programs create the impression that all the books in such continuity programs will be sent separately at monthly intervals. Such solicitations fail to disclose initially to prospective subscribers that all but the first few volumes of BHLS' continuity programs will be sent in a single shipment (Findings 92-94). BHLS concedes that prior to 1972 there was not an explicit disclosure in the initial promotional materials sent to potential subscribers of the bulk shipment (RRF, p. 27). Since 1972 BHLS' promotional materials have made some disclosures of the bulk shipment in the initial promotional materials; however, such disclosures are not clear and conspicuous (Findings 94, 99).

BHLS' continuity programs involve the negative option plan of selling (Collins, Tr. 1566, 1594). Such plans have a high potential for misleading consumers. The Commission has, therefore, issued a trade regulation rule pertaining to the use of negative option plans, effective June 7, 1974 (*Use of Negative Option Plans By Sellers In Commerce*, 38 F. R. 4896).[7] Since all communications initially are by mail, extra care is necessary to

7. The Commission originally proposed a rule prohibiting the negative option plan of selling. In proposing the rule, the Commission stated that it had reason to believe that sellers who use the negative option plan have "failed to disclose clearly and conspicuously in all advertising and sales promotional material directed to prospective subscribers complete details as to the operation of any negative option plan used, which constitutes a failure to disclose material facts to prospective subscribers * * *," (38 F. R. 4898).

completely disclose to prospective subscribers the material terms of the plan. The use of a bulk shipment for several volumes of the series is a material fact (Finding 97). The [100] Commission has repeatedly held that deceptive nondisclosure of material facts is a violation of the Federal Trade Commission Act. *See, Feil* v. *Federal Trade Commission,* 285 F. 2d 879 (9th Cir. 1960); *All-State Industries of North Carolina* v. *Federal Trade Commission,* 423 F. 2d 423 (4th Cir. 1970); *Tashof* v. *Federal Trade Commission,* 437 F. 2d 707 (D. C. Cir. 1970).

BHLS' Erroneous Billings and Dunning Letters

After customers are induced to participate in BHLS' continuity programs, some of them are subjected to unrelenting mailings of bills and dunning letters which demand payment for books that were previously returned or never received. Continuity customers even receive shipments of books after they have cancelled the program (Findings 102-105). Complaint counsel submit (CCB, p. 7) that BHLS' method of servicing the accounts of its continuity customers unfairly subjects its customers to the distinct possibility of receiving unordered merchandise and harassing dunning letters which are sent in error. Therefore, complaint counsel contend, the proscription of BHLS' method of dealing with its continuity customers is consistent with the Commission's responsibility to "proceed not only against practices forbidden by statute or common law, but also against practices not previously considered unlawful, and to create a new body of law—a law of unfair trade practices adapted to the diverse and changing needs of a complex and evolving competitive system." *All-State Industries of North Carolina, Inc.,* 75 F. T. C. 465; *affirmed,* 423 F. 2d 423 (4th Cir. 1970); *see, Federal Trade Commission* v. *Sperry & Hutchinson Co.,* 405 U. S. 233 (1972).

The record does reveal some errors in BHLS' handling of subscriber accounts (Findings 103, 108). The record also indicates that BHLS has taken steps to keep such errors at a mini-

mum (Finding 108; RM, p. 41). The Commission, in its statement of the revised proposed rule issued with the negative option trade regulation rule, stated (38 F. R. 4899):

> The Commission said it recognizes that an industry dependent upon millions of mail transactions each month cannot completely [101] avoid errors. Accordingly, random, sporadic, nonconformance with these regulations shall not constitute a violation if the seller's procedures, manpower, and facilities are adequate to ensure that the occurrence of such errors is minimized and they are corrected promptly upon their discovery, or if such nonconformance is the result of circumstances beyond the seller's control.

The present record does not demonstrate that BHLS' past errors or omissions exceed the limit recognized by the Commission, or that BHLS' procedures, manpower, and facilities are inadequate. While demonstrated past errors were flagrant, remedial steps have been taken. Accordingly, no conclusion can be made that BHLS' present methods of billing and collecting from its continuity customers is unlawful.

Respondents' Use of Collection Letters

Respondents EB and BHLS employ a series of set forms in their collection procedures. Some of these forms threaten legal action, garnishment, and sheriff's sale against the creditor customer (Findings 106, 110). After receiving a series of dunning letters, customers receive letters on the letterhead stationery of attorneys located in Chicago, Illinois. These form letters, which are approved as to form by the attorneys, are prepared and mailed by respondents who assume all operational cost involved. Replies to these letters are forwarded immediately to respondents by the attorneys (Findings 107, 110, 111).

The letters from the attorneys to delinquent accounts threaten that legal action will be taken, that suit will be filed in a local court to obtain a judgment plus all court costs, that necessary

papers are being processed for suit, that the letter constitutes proof of notification of action that is "pending against you" (CX 935), and "THIS IS FINAL NOTICE BEFORE SUIT" (CX 1634).

It is undisputed that the attorneys make no legal recommendations regarding the delinquent accounts, do not file suits against any such accounts, and are not authorized [102] to bring suit in any court against any such account. It is the corporate policy of respondents not to bring suit once they have exhausted the entire debt collection procedure. One corporate official could recall no case of a lawsuit to collect money allegedly owing to respondents (Finding 111).

The Commission has consistently held that the use of schemes which are intended to give alleged delinquent debtors the false impression that their accounts have been transferred for collection to an entity other than the creditor are violations of the Federal Trade Commission Act. *William H. Wise Co., Inc.* v. *Federal Trade Commission,* 246 F. 2d 702 (D. C. Cir. 1957), *cert. denied,* 355 U. S. 856, *International Art Co.* v. *Federal Trade Commission,* 109 F. 2d 393 (7th Cir. 1940), *cert. denied,* 310 U. S. 632; *Wilson Chemical Co., Inc.,* 64 F. T. C. 168 (1964). Respondents' practice of sending collection letters to their customers, which give the false impression that such letters are from an attorney who has been authorized to collect the debt owed to EB or BHLS, duplicates the scheme which was declared unlawful in *Wilson Chemical Co., supra.*

SUMMARY

Respondents argue that complaint counsel have presented in this case the testimony of a handful of former salesmen who have narrated stories of personal misconduct in violation of clearly stated company rules; that what is in fact no more than the testimony of an infinitesimal few among thousands of salesmen purportedly becomes conclusive proof of widespread law-

lessness requiring radical correction; and that, from these bits of evidence, complaint counsel now urge that there exists a broad continuum of misconduct (RRM, p. 2). Respondents also argue that the twenty-five (25) former salesmen called as witnesses by complaint counsel worked for EB an average of less than 10 weeks each, and that more than half of the witnesses terminated their association with EB during or prior to 1970 (RPF III-6).

Contrary to respondents' arguments, the findings of unlawful conduct which have been made herein are based on company documents, testimony of company officials, consumer testimony, and testimony of former sales representatives. This decision is not based on a few isolated departures [103] from company policy. There is no conflict in the record evidence; all evidence supports the findings of unlawful conduct, and almost every finding of fact is based upon company policy, or company-approved training, or company-condoned activities.

Further, most of the conduct found to be unlawful in this proceeding has been considered a number of times in previous Commission proceedings and held to be in violation of Section 5 of the Federal Trade Commission Act. Respondents recognize that the general propositions of law involved in this proceeding are basically well established (RRM, p. 5). Thus, while respondents argue that they have made every good faith effort to comply with the law, and point to agreements which managers and sales representatives are required to sign (RPF III 1-5), their efforts have been woefully inadequate. This is especially so in view of two previous cease and desist orders entered against respondents by the Commission. *Encyclopaedia Britannica, Inc.,* 48 F. T. C. 1416 (1952); *Encyclopaedia Britannica, Inc.,* 59 F. T. C. 24 (1961).

THE REMEDY

It is well settled that the Commission has wide latitude in fashioning remedies to stop the unlawful practices found to exist, and "* * * the courts will not interfere except where the

remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Seigel Co.* v. *Federal Trade Commission,* 327 U. S. 608, 611-613 (1946); *see also, Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683, 726 (1948); *Federal Trade Commission* v. *Ruberoid Co.,* 343 U. S. 470, 473 (1952); *Federal Trade Commission* v. *National Lead Co.,* 352 U. S. 419, 428-431 (1957); *Federal Trade Commission* v. *Colgate-Palmolive Co.,* 380 U. S. 374, 392 (1965); *L. G. Balfour Co.* v. *Federal Trade Commission,* 442 F. 2d 1 (7th Cir. 1971). The courts have affirmed the power of the Commission to go beyond the specific violations found to prohibit similar practices that a respondent may attempt to use in the future. *Federal Trade Commission* v. *Mandel Bros., Inc.,* 359 U. S. 385, 392-393 (1959); *Niresk Industries, Inc.* v. *Federal Trade Commission,* 278 F. 2d 337, 343 (7th Cir. 1960), *cert. den.* 364 U. S. 883 (1960); *Consumers Products of America, Inc.* v. *Federal* [104] *Trade Commission,* 400 F. 2d 930, 933 (3d Cir. 1968), *cert. den.* 393 U. S. 1088 (1969). In *Colgate-Palmolive Co., supra,* at 395, the Court stated:

> We think it reasonable for the Commission to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in future advertisements. As we said in *Federal Trade Commission* v. *Ruberoid Co.,* 343 U. S. 470, 473: "[T]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." Having been caught violating the Act, respondents "must expect some fencing in." *Federal Trade Commission* v. *National Lead Co.,* 352 U. S. 419, 431.

It is also firmly established that, where appropriate, the Commission is authorized to require affirmative action in its orders. *S & S Pharmaceutical Co., Inc.* v. *Federal Trade Commission,* 408 F. 2d 487. 489 (5th Cir. 1969); *All-State Industries of North Carolina, Inc.* v. *Federal Trade Commission,* 423 F. 2d 423, 425-426 (4th Cir. 1970), *cert. denied,* 400 U. S. 828; *Tashof* v. *Federal Trade Commission,* 437 F. 2d 707 (D. C. Cir. 1970).

The Commission has stated that "past conduct, in fact, must determine to some extent what the proper scope of relief should be. * * *" In short, the Commission must take into account past acts and practices of respondents in order to fashion effective relief. *The Firestone Tire & Rubber Co.,* 81 F. T. C. 398, 469 (1972), *aff'd.,* 481 F. 2d 246 (6th Cir. 1973). Such considerations are supported by the Supreme Court's opinion in *Federal Trade Commission* v. *National Lead Co., supra,* at 429, wherein the Court determined that the Commission's order was proper on the grounds, *inter alia,* that the originator of the unlawful practices "had been previously adjudged a violator of the antitrust laws."

The undersigned has taken into consideration, *inter alia,* in framing an order in this proceeding (1) the numerous violations of law by respondents which this record establishes, consisting of conduct which has been declared unlawful by the Commission over the years, (2) the fact that this order must be designed to protect the general consuming public which includes the ignorant, the unthinking [105] and the credulous (see *Charles of The Ritz* v. *Federal Trade Commission,* 143 F. 2d 676, 679 (2d Cir. 1944), (3) respondents' past record of unlawful conduct as determined in previous Commission proceedings,[8] [106]

8. In 1952, after seven (7) years of litigation, the Commission ordered respondent to cease and desist from:

> "Representing, directly or by implication, that the prices at which said books are offered for sale are special or reduced prices or are applicable for a limited time only, when such prices are in fact the customary and usual prices at which said books are sold by respondent in its regular and normal course of business" (*Encyclopedia Britannica, Inc.,* 48 F. T. C. 1416, 1427).

In 1961, after three more years of litigation, the Commission issued another order against respondent requiring it to cease and desist from representing, directly or indirectly:

> "That the prices or terms at which the aforesaid goods and services are customarily or regularly offered for sale, or sold, either singly or in combination with other goods or services, are special, reduced or discounted prices or terms; or are spe-

(Footnote continued on next page.)

and (4) the fact that "* * * once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor" (*United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 334 (1961).

The undersigned has made several changes in the order proposed by complaint counsel, including the elimination of several provisions, and the incorporation into the order of the requirement that respondent not violate any of the provisions of two recent trade regulation rules issued by the Commission.[9]

The order contains simple prohibitions against misrepresentations in EB's recruiting advertisements. EB's failure to disclose in its recruiting advertisements material facts with respect to the position offered in its recruiting advertisments has the capacity to deceive a substantial number of potential job applicants. The obvious remedy for this violation is to require disclosure of the material facts.

Respondent is prohibited from representing that any person will receive or is guaranteed a stated income unless at least thirty percent (30%) of the persons holding similar positions in the office offering the position received an equivalent or greater income during the preceding twelve months. This thirty percent (30%) figure is an arbitrary figure, as respondents contend (RRM, p. 12); however, some such requirement is obviously necessary, and thirty percent (30%) appears reasonable. Respondent should be in a position to substantiate earnings claims

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(Footnote continued from preceding page.)

cial, reduced or discounted prices or terms as a part of an offer to a special or selected class or group of purchasers or as a part of an advertising survey program or as a part of an introductory offer or as a part of any other kind of sales or promotional program; or afford any savings to the purchaser" (*Encyclopaedia Britannica, Inc.*, 59 F. T. C. 24, 43).

9. *Use of Negative Option Plans By Sellers In Commerce*, effective June 7, 1974, 16 C. F. R. § 425; *Cooling-Off Period For Door-To-Door Sales*, effective June 7, 1974, 16 C. F. R. § 429.

prior to making such claims (*see Pfizer, Inc.*, 81 F. T. C. 23 (1972).

The flat prohibition against recruiting advertisements offering management training is warranted because respondents have no management training program. If a legitimate training program is ever established, relief from this part of the order can readily be obtained from the Commission.

[107] In addition to requiring the disclosure of material facts in recruiting advertisements, the order will ensure that those persons who in fact apply for door-to-door sales positions will receive complete and truthful information relating to the nature of the position before they obligate themselves under any employment agreement. The need to make these disclosures before a job applicant enters into an employment agreement with EB is fully justified by the record which shows that EB enticed persons to sign employment contracts which imposed restrictions and limitations that made it virtually impossible to earn the promised income, and that, where salespersons met the requirements for receiving the income promised in their employment agreements, EB failed to honor such agreements.

Respondents' use of guaranteed income advertisements was particularly deceptive. To remedy this situation, the order requires that, before entering into any agreement which promises a stated income, EB must inform the applicant of the percentage of salespersons in that particular office who were actually paid the income promised under their employment agreements during the previous year. This disclosure is no absolute guide upon which a job applicant can predict his or her chances to earn the income promised by EB, but it does provide the job applicant with an objective fact which can be considered in deciding whether there is a reasonable opportunity to actually receive the income offered by EB.

Respondents are required to disclose in recruiting advertisements the basis of compensation for persons to be employed. Respondents argue that small help wanted advertisements are

impractical for such disclosures (RRM, p. 13). Compliance with such an order provision will be neither unreasonable nor impractical. Without detailing appropriate compliance procedures at this early date, some disclosure such as payment on a commission basis, or weekly or monthly salary, might suffice.

EB is prohibited by the order from disseminating any promotional material or providing any contest entry card which does not clearly disclose that any person responding to such materials may be contacted by a salesperson. This provision does not require that a salesperson call, but merely informs the public of respondent's intent in disseminating such materials and the risks or obligations [108] which may be involved. This is information the public should have, and it does not unduly interfere with any of respondent's business operations.

The order contains provisions which prohibit respondent from misrepresenting the purpose of contacting persons in their homes or places of business, and require respondent to clearly inform prospects in telephone talks and at the door that the purpose of the visit is to solicit the sale of respondent's products or services. This will correct respondent's misrepresentations and deceptions as shown by the record. As one of EB's former corporate officials testified, the ability to gain admittance into the home is essential to respondent's business operations (Balzano, Tr. 1542). Thus, elimination of misrepresentations and deceptions in gaining admittance into homes is crucial to this order as well. There is no conceivable business or other justification for misrepresenting the purpose of a salesman's visit. A homeowner is entitled to know the purpose behind any visit by a salesman. The time has arrived to put an end to deceptions of this type.

For these reasons, the order entered herewith requires EB's salesmen to present the prospect with a card which clearly discloses the purpose of the visit. Respondent strenuously objects to such an order provision (RPF III-7; RM, p. 43; RRM, p. 17); however, no satisfactory alternatives are suggested. The

use of a disclosure card should prove effective to eliminate misrepresentations and deceptions in obtaining appointments with homeowners, or in gaining admittance into homes. If this provision proves unduly onerous, relief from this provision can be requested at a later date.

The order also requires respondent's salesmen to give the prospect an opportunity to read the card at the door before any sales presentation can commence. This seems ample disclosure of the purpose of the salesman's visit. Thus, complaint counsel's proposal for different size cards depending upon the method of initial contact with a prospect seems superfluous and is rejected.

Order provisions dealing with misrepresentations as to "free" merchandise, "retail" prices, and "savings" claims are rather detailed. It is believed these provisions are necessary to ensure that the misrepresentations [109] concerning the value of the merchandise or services being offered for sale to homeowners are eliminated. In framing these provisions of the order, the undersigned has taken into consideration two previous cease and desist orders entered against respondent, which prohibited certain pricing or savings misrepresentations (see page 105, *supra.* [n. 8, p. 504, herein]). Apparently the two previous Commission orders have been ineffective. Therefore, strict and detailed provisions concerning the important area of pricing and savings claims have been incorporated into the order.

The order requires respondents to comply with two Commission Trade Regulation Rules—*Cooling-Off Period For Door-To-Door Sales* (16 C. F. R. § 429.1), and *Use of Negative Option Plans By Sellers In Commerce* (16 C. F. R. § 425.1). Both rules were issued in 1973, but became effective June 7, 1974. The record establishes substantial violations of law by respondents in the area of sales covered by these trade regulation rules, and it appears appropriate to order compliance with the rules rather than redraft the rule or tailor specific provisions to respondents in this proceeding as complaint counsel have proposed.

EB made a contention during the hearings herein that it gave purchasers the right to rescind contracts entered into at the door, a "cooling-off" period (RM, p. 50). The record clearly establishes, however, that no such right was extended to purchasers, except where required by state law. In fact, the record reveals a practice of discouraging purchasers from reading provisions of sales contracts dealing with customer rights (Findings 87-89).

Since the industry is now required to conform trade practices to the Commission's Trade Regulation Rules, respondents are in the same position as their competitors, except that respondents will be subject to a substantial monetary fine for violating the provisions of the trade regulation rules once this order becomes effective. The trade regulation rules incorporated into this order are clearly needed to correct respondents' sales practices. The Commission has determined that a "cooling-off" period is an effective method of protecting consumers from misrepresentations and deceptions by door-to-door salesmen. Such a remedy will not only correct respondents' misrepresentations and deceptions, but will extend protection to consumers. The Commission has determined that complete [110] and conspicuous disclosures by sellers, which utilize negative option sales plans, are necessary to protect the consuming public. Such order provisions are needed in this proceeding to correct respondents' trade practices. It would make a nullity of a substantial part of this proceeding to leave out a *compulsory* requirement that respondents comply with the pertinent trade regulation rules which clearly are needed to correct respondents' unlawful busines practices established after lengthy litigation. Respondents' business conduct, viewed in the light of the two previous Commission cease and desist orders, makes it imperative that formal restraints be imposed at this time.

The undersigned has eliminated from complaint counsel's proposed order a provision requiring that applicants for sales positions be furnished a detailed explanation of this order. The order which is being entered provides for furnishing such applicants with only the pertinent provisions of this order, which is believed preferable to a further lengthy explanation of the order. Complaint counsel's proposal would invite such sales applicants to communicate with respondents' president if the applicant has any reason to believe the Commission's order is being violated. Such self-interpretation or self-policing of the order may cause more confusion than light to be shed on respondents' conduct. If any applicant believes the Commission's order has been violated, it is assumed some such applicant will contact the Commission.

Also eliminated from complaint counsel's proposed order is the requirement that respondents establish a surveillance program to insure compliance with the order to be entered. Such a provision is unnecessary in view of the monetary penalties, recently increased by the Congress, for violating an order issued by the Commission.

Conclusions of Law

1. The Federal Trade Commission has jurisdiction over the respondents and the subject matter of this proceeding.

2. Respondent Encyclopaedia Britannica, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with [111] its principal place of business located at 425 North Michigan Ave., Chicago, Illinois. Respondent Britannica Home Library Services, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 425 North Michigan Ave., Chicago, Illinois. It is a wholly-owned subsidiary of respondent Encyclopaedia Britannica, Inc., and respondent Encyclopaedia Britannica, Inc. formulates, directs, and controls the acts and practices of respondent Britannica Home Library Services, Inc., including the acts and practices set forth in the complaint.

3. Through its various organizational divisions and wholly-owned subsidiary, respondent Encyclopaedia Britannica, Inc.

publishes, sells and distributes, throughout the world, textbooks, encyclopedia, reference and educational materials, training courses, and other literary works and services. Its volume of business has been, and is, substantial. Respondent Britannica Home Library Services, Inc. sells and distributes books and other merchandise through advertising and mailings. Its volume of business has been, and is substantial.

4. In the course and conduct of their businesses, as aforesaid, respondents now cause, and for some time last past have caused, said products to be shipped and distributed from their places of business or their sources of supply to purchasers and prospective purchasers thereof located in various States of the United States other than the State of origination, distribution or storage of said products. Respondents disseminate, transmit and receive, or have caused to be disseminated, transmitted and received, sales promotional materials, invoices, checks, collection notices and various other commercial papers or documents in the course of advertising, selling, distributing, and collecting payment for said products among and between the several States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in such books and other products or services in commerce, as "commerce" is defined in the Federal Trade Commission Act (15 U. S. C. §§ 41-58).

5. In the course and conduct of its business and for the purpose of recruiting persons for the door-to-door sales of its products, respondent Encyclopaedia Britannica, Inc. has caused to be disseminated advertisements in [112] various publications of general circulation which contain statements concerning the nature of the advertised positions. Through the use of the aforesaid advertisements and oral statements of its representatives or agents, respondent has represented, directly or by implication, that:

(1) respondent is offering positions in such fields as advertising, research analysis, public relations or other nonselling fields;

(2) respondent is offering to train persons as management trainees;

(3) respondent is offering persons monthly incomes in excess of $500 per month, or similar incomes; and

(4) persons engaged by respondent contact other persons in their homes primarily for the purposes of conducting surveys, advertising promotions or for other nonselling purposes.

In truth and in fact:

(1) respondent is not offering positions in the fields represented;

(2) respondent will not train persons for the positions represented;

(3) persons engaged by respondent do not receive the incomes as represented; and

(4) persons engaged by respondent do not contact people in their homes for the purposes represented by respondent.

Therefore, the statements, representations, acts and practices set forth herein were and are false, misleading and deceptive.

6. Respondent has caused to be disseminated advertisements in various publications of general circulation offering employment opportunities which fail to disclose the nature of the position being offered, the name of [113] the company, and the product or service. The use by respondent of recruiting methods for door-to-door salesmen which fail to disclose these material facts has had, and now has, the tendency and capacity to mislead a substantial portion of the public into the erroneous and mistaken belief that respondent is not recruiting persons for the door-to-door sale of encyclopedia. Therefore, respondent's failure to disclose material facts in its recruiting advertisements was and is misleading, deceptive and unfair.

7. In the further course and conduct of its business as aforesaid, and for the purpose of inducing the general public to purchase its publications, merchandise or services, respondent,

through its sales representatives, utilizes various forms of promotional materials in conjunction with oral sales presentations containing statements concerning the purpose of the initial contact with the prospect, the identity of the solicitor, the nature of the offer and the terms of respondent's contracts or other agreements. In the foregoing manner, respondent and its sales representatives have represented, directly or by implication, that:

(1) respondent's sales representatives are contacting persons in their homes or places of business for purposes other than the sale of respondent's publications, merchandise or services;

(2) respondent is offering certain of its publications, merchandise or services free or without cost to persons agreeing to perform certain cooperative acts;

(3) persons who purchase respondent's publications, in combination with other publications, will realize a significant savings from the claimed retail prices of respondent's publications;

(4) respondent's sales representatives will take only a few minutes to complete their presentations inside prospects' homes or places of business;

(5) persons subscribing to respondent's Library Research Service receive answers to questions regarding any subject, except medical or legal advice; and

[114] (6) the answers provided by respondent's Library Research Service are the product of detailed, exhaustive or original research generated by the specific questions asked by subscribers to said Service.

In truth and in fact:

(1) Respondent's sales representatives contact persons in their homes or places of business for the purpose of selling respondent's publications, merchandise or services;

(2) respondent is not offering certain of its publications, merchandise or services free or without cost to any person who agrees to perform certain cooperative acts;

(3) persons who purchase respondent's publications, in combination with other publications, will not realize a significant savings;

(4) respondent's sales representatives do not ordinarily complete their presentations inside prospects' homes or places of business within only a few minutes;

(5) persons subscribing to respondent's Library Research Service do not receive answers to questions regarding any subjects, except medical or legal advice; and

(6) the answers provided by respondent's Library Research Service are not the product of detailed, exhaustive and original research generated by specific questions asked by the subscribers to said Service.

Therefore the statements, representations, acts and practices set forth herein were and are false, misleading and deceptive.

8. In the further course and conduct of its business, respondent has conducted various contests and utilized other promotional devices for the purpose of obtaining leads to persons who will allow respondent's sales representatives into said persons' homes for the purpose of [115] inducing said persons to purchase respondent's products. Persons who enter any contest, or who receive informational brochures, or who are told that they have been awarded a valuable gift, are not informed of the material fact that, as a result of entering the contest, receiving the informational brochures, or gifts, such persons will be contacted by a sales representative for the purpose of making a sales presentation for respondent's publications, merchandise or services. Therefore, respondent's statements and representations, and the failure to disclose material facts as aforesaid were and are false, misleading and deceptive.

9. In the course and conduct of their business, respondents Encyclopaedia Britannica, Inc. and Britannica Home Library Services, Inc. have disseminated and are disseminating advertisements in various publications of general circulation or in pro-

motional materials mailed to members of the general public to induce persons to become subscribers to continuity book promotion programs. The aforesaid advertisements and promotional materials place emphasis on shipment of books singly at intervals, without clearly and conspicuously disclosing the material fact that all but a few of the books are mailed to subscribers by means of a bulk shipment. Respondents' advertisements and promotional materials also represent, directly or by implication, that persons who subscribe to respondents' continuity programs do so without risk or obligation. In truth and in fact, subscribers to respondents' continuity programs must notify respondents to prevent shipment of additional books, must return to respondents all books found unacceptable, and must pay for all books not returned to respondents. Subscribers also incur the risk that, due to delays in mail delivery or computer error, they will receive unordered merchandise or incorrect billings. Therefore, the representations set forth hereinabove were and are false, misleading and deceptive.

10. In the further course and conduct of their business and for the purpose of collecting debts allegedly due and owing respondents pursuant to contracts or other agreements relating to the purchase of respondents' publications, merchandise or services, respondents, in numerous instances, have attempted to induce payment of accounts, either due or delinquent as the case may be, by sending dunning letters, notices or similar instruments [116] in the United States mails which contain statements and representations, directly or by implication, that:

(a) Letters or notices on the letterheads of attorneys are prepared or mailed by those individuals; and

(b) respondents regularly transfer accounts to attorneys with instructions to institute suit or to take other legal measures to collect an alleged outstanding debt.

In truth and in fact:

(a) Notices are prepared or mailed, in many instances, by respondents and replies or responses to said mailings are forwarded to respondents; and

(b) respondents do not regularly transfer accounts to attorneys with instructions to institute suits or to take other legal action to collect allegedly outstanding debts.

Therefore, the statements and representations set forth above were and are false, misleading and deceptive.

11. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of publications, merchandise and services of the same general kind and nature as that sold by respondents. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices, and their failure to disclose material facts have had, and now have, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, or into the purchase or retention of, and payment for, substantial quantities of said publications, merchandise and services by reason of said erroneous and mistaken belief.

[117] 12. The aforesaid statements, representations, acts and practices of respondents were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U. S. C. § 45).

13. The order entered hereinafter is necessary to correct the unlawful conduct in which it has been concluded that respondents have been, and are, engaged, and to protect the public. [118]

ORDER

It is ordered, That respondent Encyclopaedia Britannica, Inc., and its successors and assigns, officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary, division or other device, in connection with the recruitment of persons to sell, rent, lease, or distribute any textbook, encyclopedia, reference or educational material, or any other publication, merchandise or service, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I

A. Representing, directly or by implication, either orally or in writing, that:

(1) Respondent is offering positions in such fields as advertising analysis, public relations, marketing, interviewing, or in any field other than door-to-door sales, if door-to-door sales is included, to any extent, in the position for which persons are being recruited; or misrepresenting, in any manner, the job for which any person is being solicited;

[119] (2) persons will be trained as management trainees, or for other positions of responsibility concerned with administrative office functions; or misrepresenting, in any manner, the amount and type of training that will be given;

(3) any person may receive or is guaranteed a stated income, unless at least thirty percent (30%) of the persons holding similar positions at the office offering the position during the twelve (12) months immediately preceding the stated representation have received an equivalent or greater income; or misrepresenting, in any manner, the amount of income to be earned by any person or that may be earned by any person, the method of payment, or any condition or limitation imposed upon the compensation of any person;

(4) any person who may be employed will contact prospects in their homes or places of business for the purposes of conducting surveys, advertising promotions, or other nonselling functions; or misrepresenting, in any manner, the purposes for which any person is engaged.

[120] B. Failing to disclose, clearly and conspicuously, in all advertising offering employment in any way involving door-to-door sales, that:

(1) Respondent is recruiting persons for the sole purpose of soliciting or selling;

(2) that such soliciting or selling will be on a door-to-door basis;

(3) that the products or services being sold are encyclopedias or services to be used in connection therewith, or in the event that encyclopedias or such related services are not being sold, the products and services being sold; and

(4) the basis for compensating persons so engaged

C. Failing to clearly and conspicuously advise, both orally and in writing, any prospective sales employee at the initial face-to-face interview, and prior to executing any employment agreement with any such person, the following information:

(1) All those disclosures set forth in Paragraph I B above;

(2) a complete and detailed description of each condition and limitation imposed upon the receipt of any compensation;

[121] (3) where applicable, notification that such person will not be paid for time spent during orientation and training;

(4) a complete and detailed description of any expense or expenses any such person may incur in performing the required duties; and

(5) the percentage of persons holding similar positions engaged by the office offering the position during the twelve (12) months immediately preceding the offer, who have actually received an equivalent, or greater, income than that promised under the terms of any such agreement.

D. Failing to furnish to persons at the initial face-to-face interview, and prior to executing any employment agreement with any such person, a copy of Paragraphs I, II, III and VI of this order, together with a cover letter as set forth in Appendix A attached hereto.

II

If is further ordered, That respondent Encyclopaedia Britannica, Inc., and its successors and assigns, officers, agents, representatives and employees, directly or indirectly, [122] through any corporation, subsidiary, division or other device, in connection with the publishing, advertising, offering for sale, sale, rental, lease or distribution of any textbook, encyclopedia, reference or educational material, or any other publication, merchandise or service, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Disseminating or causing to be disseminated any advertisement or promotional material which solicits participation in any contest, drawing or sweepstakes, or solicits any response to any offer of merchandise, service or information unless any such solicitation clearly and conspicuously discloses the following statement in 10-point boldface type:

NOTICE TO CONSUMER—PERSONS WHO REPLY AS REQUESTED MAY BE CONTACTED BY A SALESPERSON FOR THE PURPOSE OF SELLING [insert name of applicable product].

B. Providing any return card, coupon or other device which is used to respond to any advertisement or promotional material covered by Paragraph II A [123] above, unless the following statement clearly and conspicuously appears in 10-point boldface type in immediate proximity to the space provided for a signature or other identification of the responding party:

NOTICE TO CONSUMER—PERSONS WHO RETURN THIS [insert name of applicable device] MAY BE CONTACTED BY A SALESPERSON FOR THE PURPOSE OF SELLING [insert name of applicable product].

C. Failing to disclose clearly and conspicuously, at the beginning of any telephone call to any prospective customer, the fact that the individual making the call is either soliciting the sale, rental or lease of publications, merchandise or services for respondent, or is arranging for a sales solicitation to be made, and that if the prospective customer so agrees, respondent will send a salesperson to visit said prospect for the purpose of soliciting the sale, rental or lease of said publications, merchandise or services.

D. Visiting the home or place of business of any person for the purpose of soliciting the sale, rental or lease of any publications, merchandise or service, unless at the time admission is sought into the home or place of business of such person, a card 3 inches by 5 inches in dimension, with all words in 10-point boldface type, with the following information, and none other, in the [124] indicated order, is presented to such person:

(1) The name of the corporation;

(2) the name of the salesperson;

(3) the term "Encyclopedia Sales Representative" [or other applicable product];

(4) the terminology: "The purpose of this representative's call is to solicit the sale of encyclopedias" [or other applicable product]; and

(5) the statement: This card should be kept as part of your permanent records of this transaction.

E. Failing to give the card, required by Paragraph II D, above, to each such person, to direct each such person to read the information contained on such card, and to provide each such person with an adequate opportunity to read the card before engaging any such person in any sales solicitation.

F. Representing, directly or by implication, either orally or in writing that:

(1) Any person calling on any prospective purchaser is:

[125] (a) engaged in or connected with "advertising," "marketing," "promotion," "education" or anything other than the door-to-door sale of encyclopedias or other reference materials;

(b) conducting, taking or participating in a survey, advertising research analysis or any other information gathering activity; or

(c) calling on said prospect for the primary purpose of delivering or disseminating prizes, gifts, gift certificates, chances in any contest, drawing, sweepstakes, educational fund or any other merchandise or item of chance;

(2) only a few minutes will be required to complete the visit inside the prospective purchaser's home or place of business; or misrepresenting, in any manner, the period of time required to complete the sales or other presentation;

[126] (3) an offer is limited, must be accepted immediately or within any specified time period, or is a special offer, unless such is a fact; or misrepresenting, in any manner, the duration of any sales offer;

(4) any publication, merchandise or service is being offered free, without cost, or is given as a bonus or otherwise to any prospective purchaser of respondent's publications, merchandise or services agreeing to perform any advertising, promotional or selling function, including but not limited to, any of the following acts or similar acts:

(a) permit their names to be listed as local owners of the product or service;

(b) provide the name of any person who may be interested in purchasing any publication, merchandise or service;

(c) write a letter evaluating the merits of any publication or other item which may be used in advertising; or

[127] (5) any publication, merchandise or service is being offered free, without cost, or is given as a bonus or otherwise to any purchaser of respondent's publications, merchandise or

services, pursuant to any agreement to purchase, rent or lease any other publication, merchandise, service or combination thereof from respondent, unless:

(a) The contract price for the purchase, rental or lease of any such other publication, merchandise, service, or combination thereof, has remained at the said price or above for at least six (6) months within the last twelve (12) months immediately preceding the time at which the representation is made;

(b) the publication, merchandise or service which is being offered free, without cost or is given as a bonus or otherwise, has not been included in the sale, rental or lease of any such other publication, [128] merchandise, service or combination thereof, to any person for a period of at least six (6) months within the last twelve (12) months immediately preceding the time at which the representation is made; and

(c) no publication, merchandise, service, or combination thereof, of equivalent or greater value, has been eliminated by respondent from any such other publication, merchandise, service, or combination thereof, with which the free, without cost or bonus publication, merchandise or service is being offered;

Provided, however, Any such prices as are restricted by Paragraph II F (5)(a) of this order may be altered at any time by respondent to reflect *bona fide* changes in market conditions.

G. Representing, directly or by implication, either orally or in writing that:

(1) Any person using any research service will receive answers to questions regarding all subjects other than legal or medical advice; [129] or misrepresenting, in any manner, the research service that will be furnished to subscribers;

(2) any answer provided by any research service is the product of detailed, exhaustive or original research generated by the specific question asked by any person utilizing said service, unless such is the fact; or misrepresenting, in any manner, the extent of research, preparation or quality of any answer furnished by any such research service.

H. Failing to disclose, clearly and conspicuously, in writing on all promotional materials describing any research service, and orally during the course of any sales or other presentation relating to said service, each condition or limitation placed upon the use of such research service.

I. Representing to any person, directly or by implication, either orally or in writing that:

(1) Any price is the retail, regular, usual, or words of similar import or effect, price for any publication in any binding, merchandise or service, unless respondent has made at least forty percent (40%) of its unit sales for each such publication in each such binding, [130] merchandise or service, individually, during the previous six (6) months at or above the represented price;

(2) any price is the retail, regular, usual, or words of similar import or effect, price for any set of publications in any binding and in combination with any other publication, merchandise or service, unless respondent has made at least forty percent (40%) of its unit sales for each such set of publications in each said binding during the previous six (6) months individually or in combination at or above the represented price;

(3) savings may be realized by the purchase, rental or lease of any publication, merchandise or service, or any combination thereof, from respondent's previous prices for its products unless:

(a) Such savings claims are based upon retail, regular, or usual prices, or combination prices, arrived at in accordance with Paragraph II I(1) and (2) above;

(b) respondent clearly and conspicuously specifies the publication, merchandise or service, or combination thereof, and [131] the price from which the savings is to be realized; and

(c) the publication, merchandise or service is of comparable quality in all material respects with the publication, merchandise or service sold at the higher price;

(4) savings may be realized by the purchase, rental or lease of any publication, merchandise or service, or any combination thereof, from comparable products of competitors unless:

(a) respondent clearly and conspicuously specifies the publication, merchandise or service, or combination thereof, from which the savings is to be realized;

(b) the price utilized for comparison purposes is the price at which a substantial number of persons have purchased the item referred to in (a) immediately above;

(c) the item referred to in (a) above is of comparable quality in all material respects to the product being sold; and

[132] (d) respondent has in good faith conducted a market survey or obtained a similar representative sample of prices in the trade area where the comparison is made which establishes the validity of said compared price.

J. Misrepresenting in any manner, either orally or in writing:

(1) the amount of savings to be realized by any person who enters into an agreement with respondent for any publication, merchandise or service; or

(2) that any publication, merchandise or service is being offered free or without charge, or is given to any such person.

K. Failing to comply with any and all provisions of the Commission's Trade Regulation Rule, *Cooling-Off Period For Door-To-Door Sales,* (16 C. F. R. § 429.1), which are in effect on the date this order becomes effective, and with any modifications or changes in the aforesaid rule which may be made from time to time. A copy of the said rule shall be made a part of this order for purposes of complying with other provisions hereof.

[133] L. Initiating contact with any purchaser through any means for any reason from the time said purchaser enters into any agreement containing a NOTICE OF CANCELLATION, as required by Paragraph II K of this order, until said buyer's cancellation period has expired.

M. Failing to maintain a copy of each NOTICE OF CANCELLATION received pursuant to Paragraph II K of this order, and making said documents available for inspection and copying by the Commission's staff upon reasonable notice. Any such NOTICE shall be maintained for a period of three (3) years from date of receipt by respondent.

N. Failing to keep adequate records, which shall be maintained for a period of three (3) years and made available to the Commission's staff for inspection and copying upon reasonable notice, from which the validity of any savings claims, retail price claims, comparative value claims, or other representations of the type described in Paragraphs II F(5), II I and II J of this order can be determined. [134]

III

It is further ordered, That respondent Encyclopaedia Britannica, Inc., and its successors and assigns, officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary, division, or other device, in connection with the training or orientation of any person to sell, rent, lease or distribute any textbook, encyclopaedia, reference or educational material, or any other publication, merchandise or service, in commence, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making, distributing or using any training tapes, sales manuals, or any other document, method or device which contains any representation or instruction inconsistent with any provision of Paragraph II of this order.

IV

It is further ordered, That respondents Encyclopaedia Britannica, Inc. and Britannica Home Library Services, Inc. and their successors and assigns, officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution [135] of any textbook, encyclopedia, reference or educational material, or any other publication, merchandise or service through the use of any program, plan, method, or device, that provides or purports to provide for the sale or distribution of any of said items to any person at intervals on an approval basis, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, either orally or in writing that:

(1) Any person has the option to receive each publication, merchandise or service, separately and individually, and to accept or reject same, unless such person is allowed in all instances to receive and to purchase or reject each such publication, merchandise or service separately and individually;

(2) any person will not receive any further publication, merchandise or service after he notifies respondents of his cancellation of any such program, plan or method of sale or distribution, unless such is the fact; or misrepresenting, in any manner, any [136] consequence resulting from any person's cancellation of his participation in any such program, plan, or method of sale or distribution; and

(3) any person incurs no risk or obligation by joining or participating in any such program, plan, or method of sale or distribution; or misrepresenting, in any manner, any condition, right, duty or obligation imposed on any person.

B. Disseminating, or causing the dissemination of, any advertisement which fails to disclose in a clear and conspicuous manner:

(1) A description of the conditions and terms of any such program, plan, or method of sale or distribution, and the duties, risks and obligations of any subscriber thereto; and

(2) a description of each publication, merchandise or service to be offered for sale, the billing charge to be made therefore,

the anticipated total number of publications, merchandise or services included in any such program, plan or method of sale or distribution, the number of publications, merchandise or services that will be included [137] in each shipment of such items, and the number of and the intervals between each such shipment.

C. Failing to disclose, clearly and conspicuously, on any return coupon, order form or any other document used for responding to any such program, plan, or method of sale or distribution, the following information:

(1) The anticipated total number of publications, merchandise or services included in any such program, plan, or method of sale or distribution;

(2) the number of publications, merchandise or services that will be included in each shipment of such items; and

(3) the number of and the intervals between each such shipment.

D. Failing to disclose, clearly and conspicuously, in immediate conjunction with any publication, merchandise, service or notice thereof sent to any subscriber, the anticipated date on which respondents will initiate processing of the next shipment of any such item.

[138] E. Failing to provide to any person in conjunction with each notice of any shipment of any publication, merchandise or service, a clear and conspicuous means by which said person may exercise his option or right to cancel said shipment, if such is his right.

F. Failing to comply with any and all provisions of the Commission's Trade Regulation Rule, *Use of Negative Option Plans By Sellers In Commerce* (16 C. F. R. § 425.1), which are in effect on the date this order becomes effective, and with any modifications or changes of the aforesaid rule which may be made from time to time.

V

It is further ordered, That respondents Encyclopaedia Britannica, Inc. and Britannica Home Library Service, Inc. and their successors and assigns, officers, agents, representatives, and employees, directly or indirectly, through any corporation, subsidiary, division or other device, in connection with the collection or attempted collection of any debt allegedly owing to respondents for the purchase or other receipt of any textbook, encyclopaedia, reference or educational material, or any other publication, merchandise or service, in commerce, as "commerce" is defined in [139] the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, either orally or in writing that:

(A) Any letter, notice or other communication which has been prepared, originated or composed by respondents has been prepared, originated by any other person, firm or corporation; and

(B) suit will be instituted to recover any delinquent debt, or that any delinquent debt will be transferred to any attorney with instructions to institute suit, or that any other legal step to collect any outstanding debt will be taken, unless a definite date is set forth for such action and such are the facts; or misrepresenting, in any manner, respondents' relationship with, or instructions to, any attorney, or the course of action that will be taken by any attorney. [140]

VI

It is further ordered, That respondents, Encyclopaedia Britannica, Inc. and Britannica Home Library Services, Inc., do the following:

(A) Deliver, by registered mail, a copy of this order to each of their salesmen, agents, solicitors, independent contractors, or to any person engaged in the promotion, sale or distribution of any of the publications, merchandise or services included in

this order, and to any person engaged by respondents to perform such duties in the future at the time such person is so engaged;

(B) obtain from each person described in Paragraph VI(A) a signed statement setting forth his intention to conform his business practices to the requirements of this order; retain said statement during the period of three (3) years thereafter; and make said statement available to the Commission's staff for inspection and copying upon reasonable notice;

(C) advise each such present and future salesman, agent, solicitor, independent contractor or any person engaged in the promotion, sale or distribution of any of the publications, merchandise or [141] services included in this order that respondents will terminate the engagement or services of any such person, unless each person agrees to and does furnish to respondents a statement required by Paragraph VI(B), above; and

(D) if any such person will not agree to file a statement with respondents as required by Paragraph VI(B) above and be bound by the provisions of this order, the respondents shall immediately terminate the services of such person.

VII

It is further ordered, That the respondents shall forthwith distribute a copy of this order to each of their operating divisions.

VIII

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in any of the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of which may affect compliance obligations arising out of this order. [142]

IX

It is further ordered, That respondents shall, within sixty (60) days after the effective date of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order. [143]

APPENDIX A

NOTICE

Attached hereto are the pertinent provisions of a cease and desist order entered against Encyclopaedia Britannica by the Federal Trade Commission, an agency of the Federal Government. Violation of any provision of this Order can result in severe monetary penalties to Encyclopaedia Britannica. If you are employed by Encyclopaedia Britannica, you will be *required* to observe the provisions of this Order.

You should carefully read this Order before agreeing to any employment arranged with Encyclopaedia Britannica.

[*President*]
Encyclopaedia Britannica

THE FEDERAL TRADE COMMISSION ACT, 15 U. S. C. § 45

§ 45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair parctices.

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Proceeding by Commission; Modifying and Setting Aside Orders.

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the

place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunty for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review

thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Review of Order; Rehearing.

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necesary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the

Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

Jurisdiction of Court.

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Precedence of Proceedings; Exemption from Liability.

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

Service of Complaints, Orders and Other Processes; Return.

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal

office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

Finality of Order.

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

Same; Order Modified or Set Aside by Supreme Court.

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; Order Modified or Set Aside by Court of Appeals.

(i) If the order of the Commision is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; Rehearing Upon Order or Remand.

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

Defintion of Mandate.

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalty for Violation of Order; Injunctions and Other Appropriate Equitable Relief.

(l) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem aprpopriate in the enforcement of such final orders of the Commission.

Civil Actions for Recovery of Penalties for Knowing Violations of Rules and Cease and Desist Orders Respecting Unfair or Deceptive Acts or Practices; Jurisdiction; Maximum Amount of Penalties; Continuing Violations; De Novo Determinations; Compromise or Settlement Procedure.

(m)(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts

or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1) of this section, each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the de-

fendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo.

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

As amended Nov. 16, 1973, Pub. L. 93-153, Title IV, § 408(c), (d), 87 Stat. 591, 592; Jan. 4, 1975, Pub. L. 93-637, Title II, §§ 201(a), 204(b), 205(a), 88 Stat. 2193, 2200; Dec. 12, 1975, Pub. L. 94-145, § 3, 89 Stat. No. 801.

No. 79-697

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1979

ENCYCLOPAEDIA BRITANNICA, INC. AND BRITANNICA HOME LIBRARY SERVICES, INC., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 1

Statement 2

Argument 6

Conclusion 14

CITATIONS

Cases:

All-Luminum Products, Inc., 63 F.T.C. 1268 10

American Academic Research Society, 17 F.T.C. 419 9

Americana Corp., 45 F.T.C. 32 9

Associated Press v. *United States*, 326 U.S. 1 11

Basic Books, Inc., 56 F.T.C. 69 9

Bates v. *State Bar of Arizona*, 433 U.S. 350 ..... 6, 7, 8

Beneficial Corp. v. *FTC*, 542 F. 2d 611, cert. denied, 430 U.S. 983 11

Brown v. *Glines*, No. 78-1006 (Jan. 21, 1980) 12

P.F. Collier & Son Corp. v. *FTC*, 427 F. 2d 261 10

Page

Cases—(Continued):

Consolidated Book Publishers, Inc., 14 F.T.C. 13 9

The Crowell-Collier Publishing Co., 70 F.T.C. 977 9

Encyclopaedia Britannica, Inc., 59 F.T.C. 24 9

Encyclopaedia Britannica, Inc., 48 F.T.C. 1416 9

FTC v. *Colgate-Palmolive Co.*, 380 U.S. 374 10

FTC v. *National Lead Co.*, 352 U.S. 419 10

FTC v. *Standard Education Society*, 302 U.S. 112 9

Friedman v. *Rogers*, 440 U.S. 1 ..... 6, 7, 8, 11, 12

General Surveys, Inc., 34 F.T.C. 1157 9

Grolier, Inc., 91 F.T.C. 315, remanded on other grounds, No. 78-2159 (9th Cir. Jan. 24, 1980) 9

Holst Publishing Co., 24 F.T.C. 404 9

Kerran v. *FTC*, 265 F. 2d 246 10

National Comm'n on Egg Nutrition v. *FTC*, 570 F. 2d 157, cert. denied, 439 U.S. 821 ..... 7, 11, 12

Page

Cases—(Continued):

National Educators, Inc., 49 F.T.C. 1358 9

National Society of Professional Engineers v. *United States*, 435 U.S. 679 ..... 7, 8, 11

Nat'l Surveys and Educational Development Co., 47 F.T.C. 888 9

Ohralik v. *Ohio State Bar Ass'n*, 436 U.S. 447 ..... 6, 7, 8, 11, 12, 13

Pittsburgh Press Co. v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 11

Porter & Dietsch, Inc. v. *FTC*, 605 F. 2d 294, petition for cert. pending, No. 79-731 ..... 7, 8, 10, 11, 13

Schaumburg v. *Citizens for a Better Environment*, No. 78-1335 (Feb. 20, 1980) 7

Jacob Siegel Co. v. *FTC*, 327 U.S. 608 10

Virginia Pharmacy Board v. *Virginia Citizens Consumer Council*, 425 U.S. 748 ..... 7, 8, 10

Ward Laboratories, Inc. v. *FTC*, 276 F. 2d 952, cert. denied, 364 U.S. 827 10

Warner-Lambert Co. v. *FTC*, 562 F. 2d 749, cert. denied, 435 U.S. 950 ..... 8, 10, 11, 13

Page

Cases—(Continued):

J.B. Williams Co. v. *FTC*, 381 F. 2d 884 10

World Library Guild, Inc., 23 F.T.C. 598 9

Young v. *American Mini Theatres, Inc.*, 427 U.S. 50 7

Constitution and statute:

United States Constitution, First Amendment 5, 6, 8, 10, 11, 12

Federal Trade Commission Act, Section 5, 15 U.S.C. 45 3-4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 605 F. 2d 964. The order and opinions of the Federal Trade Commission (Pet. App. A26-A183) are reported at 87 F.T.C. 421.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1979 (Pet. App. A1). The petition for a writ of certiorari was filed on October 31, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the pattern of deliberate and repeated deceptive practices found by the Federal Trade Commis-

sion on this record warranted the Commission's conclusion that requiring petitioners to make certain disclosures in their advertisements and at-home solicitations is necessary to remedy those practices and prevent their recurrence.

STATEMENT

1. Petitioners publish, sell, and distribute various textbooks, encyclopedias, reference and educational materials, training courses and other similar works and services. Petitioners primarily solicit direct sales to customers in their homes on a door-to-door basis. In order to gain entry into a potential customer's home and to circumvent aversion to door-to-door sales solicitations, petitioners trained and directed their sales people to misrepresent the actual purpose of their visit.[1] For example, petitioners told their sales people to deny that they were in fact salespersons and to state that they were conducting an advertising research survey. Petitioners provided their employees with bogus survey questionnaires and a spurious letter from the advertising director to facilitate this deception. As soon as the potential customer had filled in the "survey," the salespersons were instructed to begin their sales pitch. Thereafter, the completed surveys were never used or analyzed (Pet. App. A2, A28-A30, A59-A61, A82, A86, A91, A114-A115, A145-A147).

Moreover, petitioners used various alleged contests and other misleading promotions as a means of obtaining leads for their salespersons. Thus, petitioners' magazine and direct mail advertisements offered free Britannica merchandise, gift certificates, and informational brochures for those responding. None of these

[1]Petitioners also engaged in various deceptive practices in recruiting their sales people (Pet. App. A26, A61-A81).

advertisements disclosed that persons who responded would be contacted directly by salespersons. Indeed, the advertisements indicated that the publisher would send the free materials by mail. Likewise, the purported contest entry cards suggested only that those who sent in a card would have a chance to win one of petitioners' publications with "no obligation" and that "winners will be notified by telephone." In fact, however, petitioners' salespersons directly contacted those who sent in cards, falsely stated that they had come to the house solely to deliver a free booklet or other prize, and then attempted to sell petitioners' products to the "contest" entrant (Pet. App. A35-A36, A110-A112, A146).

The sales presentation itself was also designed to deceive. Petitioners instructed their representatives to sell merchandise on the "cooperative plan." Petitioners' sales persons would thereby lead customers to believe that they were obtaining certain extra products free as a result of their limited cooperation, that the total cost of the cooperative plan was substantially less than the retail price, and that the offer was open for a limited time only. All of these representations were false and misleading. Similarly, petitioners' sales and advertising materials regarding their "Library Research Service" and "Continuity Book Programs" were also deliberately deceptive. In addition, petitioners trained their sales persons to mislead the customer about his cancellation rights. Finally, petitioners' debt collection procedures were also characterized by numerous false, misleading and deceptive statements (Pet. App. A26, A91-A131).

2. After evidentiary hearings on an administrative complaint, the Federal Trade Commission found (Pet. App. A26-A37) that petitioners' sales operations were deliberately and thoroughly permeated with deceptive, misleading and unfair practices, in violation of Section 5

of the Federal Trade Commission Act, 15 U.S.C. 45.[2] In particular, the Commission focused on petitioners' in-home solicitation methods, observing that petitioners' "sales representatives have been trained to disguise the main purpose of the visit in a way which deceives the consumer as to the real reason the representative seeks admittance to the home—to make a sale" (Pet. App. A28). The Commission concluded that "[t]he company-prescribed disguise techniques necessitate * * * an order provision requiring clear and conspicuous disclosure of the fact that the representative is a salesman and of the true purpose of gaining entry into the home" (*id.* at A29-A30). Accordingly, the Commission ordered that before seeking admission to a home or business to solicit a sale, petitioners' representatives present a three-by-five card setting forth the name of the salesperson, the name of the corporation, the term "Encyclopedia [or other applicable product] Sales Representative," and the statement "The purpose of this representative's call is to solicit the sale of encyclopedias [or other applicable product]" (*id.* at A40-A41).[3]

Similarly, the Commission held that affirmative disclosures were necessary to remedy petitioners' deceptive advertisement and promotional contest procedures. The Commission therefore directed petitioners to cease and desist from disseminating advertising or promotional

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[2]With minor exceptions, the Commission adopted (Pet. App. A37) the extensive findings and conclusions of the administrative law judge (*id.* at A52-A169).

[3]These admonitions must be in 10-point bold face type and the salesperson must give the prospective customer an opportunity to read the card (Pet. App. A41). The administrative law judge would have required a statement on the card advising the consumer to keep the card as part of his records (Pet. App. A173). The Commission deleted this statement as unnecessary (*id.* at A30-A31).

materials inviting response or contest participation unless such materials contained the following notice in 10-point bold face type: "NOTICE TO CONSUMER—PERSONS WHO REPLY AS REQUESTED MAY BE CONTACTED BY A SALES PERSON FOR THE PURPOSE OF SELLING [insert name of applicable product]" (Pet. App. A40). The Commission further ordered that a similar notice appear on any return card or coupon accompanying the promotional material (*ibid.*).[4]

3. Petitioners sought review in the court of appeals, challenging only certain remedial provisions of the Commission's order (Pet. App. A2). The court of appeals affirmed in an extensive opinion and enforced the Commission's order (Pet. App. A1-A25). Observing that the Commission had fully considered other alternatives (*id.* at A11-A12), the court held that the affirmative disclosures required by the Commission are "reasonably related to [petitioners'] deceptive practices" (*id.* at A10).[5] The court further concluded that the Commission's order did not violate petitioners' First Amendment rights because the remedies ordered by the Commission are no "broader than is necessary to prevent future deception or

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[4]The Commission's order (Pet. App. A37-A51) also prohibits petitioners from continuing to engage in the broad range of deceptive and misleading behavior detailed above. Thus, petitioners' representatives may not state that they are not salespersons, that they are conducting a marketing survey, or that they are calling on a prospective customer for the purpose of delivering a prize, free booklet, or similar item (Pet. App. A41). Petitioners do not challenge the prohibitive provisions of the order (Pet. 4).

[5]The court of appeals also rejected petitioners' claims that the Commission's proceeding against Britannica was discriminatory (see Pet. App. A15-A17) and that the Commission had improperly relied on an extra-record Commission policy study (*id.* at A17-A21). These issues are not before the Court.

correct past deception" (*id.* at A13) and are "the least restrictive alternative which will adequately further the legitimate governmental interest of the prevention of deception" (*id.* at A15).[6]

ARGUMENT

Petitioners do not contest the findings of the Commission regarding their purposeful and widespread sales deceptions. Moreover, they acknowledge that, consistent with the First Amendment, the Commission may require a commercial enterprise to make affirmative disclosures "necessary to prevent deception" (Pet. 13, 15). Thus, their central claim is that the specific affirmative disclosures ordered in this case violate their First Amendment rights because the remedies selected by the Commission are excessive. The court of appeals correctly rejected this limited and fact-specific claim in an extensive opinion. That decision does not conflict with any decision of this Court or any court of appeals, and further review is unwarranted.

1. The First Amendment, of course, affords commercial speech a limited measure of protection. See, *e.g.*, *Friedman* v. *Rogers*, 440 U.S. 1, 9-11 & n.9 (1979); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 455-456 (1978); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 383 (1977). But such speech occupies a clearly "subordinate position in the scale of First Amendment values" and is subject to "modes of regulation that might be impermissible in the realm of non-commercial expression." *Ohralik* v. *Ohio State Bar Ass'n*, *supra*, 436 U.S. at 456;

[6]Judge Wood dissented, stating that the Commission did not adequately explain its affirmative disclosure requirements, which in any event were too severe (A22-A25).

see *Friedman* v. *Rogers*, *supra*, 440 U.S. at 10-11 n.9.[7] It is thus well settled that the government has broad power to regulate and to restrict potentially false, unlawful, deceptive, or misleading commercial speech, especially in the context of in-person solicitations. See, *e.g.*, *Schaumburg* v. *Citizens for a Better Environment*, No. 78-1335 (Feb. 20, 1980), slip op. 17 n.11; *Friedman* v. *Rogers*, *supra*, 440 U.S. at 9-10; *Ohralik* v. *Ohio State Bar Ass'n*, *supra*, 436 U.S. at 455-467; *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 697-699 (1978); *Bates* v. *State Bar of Arizona*, *supra*, 433 U.S. at 383-384; *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 68-69 & n.31 (1976); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771-772 & n.24 (1976).[8]

Furthermore, there is no doubt that the Commission may constitutionally "require that a commercial message appear in such a form . . . as [is] necessary to prevent its being deceptive." *Friedman* v. *Rogers*, *supra*, 440 U.S. at 10, 16, quoting *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, *supra*, 425 U.S. at 772 n.24. See, *e.g.*, *Bates* v. *State Bar of Arizona*, *supra*, 433 U.S. at 383-384; *Porter & Dietsch, Inc.* v. *FTC*, 605 F. 2d 294

[7]For example, overbreadth analysis is not applicable to commercial speech regulation. See *Schaumburg* v. *Citizens for a Better Environment*, No. 78-1335 (Feb. 20, 1980), slip op. 12 n.7, 14; *Friedman* v. *Rogers*, *supra*, 440 U.S. at 11 n.9; *Ohralik* v. *Ohio State Bar Ass'n*, *supra*, 436 U.S. at 462 n.20; *Bates* v. *State Bar of Arizona*, *supra*, 433 U.S. at 380-381.

[8]As the Court pointed out in *Ohralik* v. *Ohio State Bar Ass'n*, *supra*, 436 U.S. at 457:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection.

(7th Cir. 1979), petition for cert. pending, No. 79-731; *National Comm'n on Egg Nutrition* v. *FTC*, 570 F. 2d 157, 160-162 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978); *Warner-Lambert Co.* v. *FTC*, 562 F. 2d 749, 758-763 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978).[9] In sum, so long as "the relief represents a reasonable method of eliminating * * * illegal conduct," an affirmative disclosure requirement does not run afoul of the First Amendment. *National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 698. See *id.* at 697; *Bates* v. *State Bar of Arizona*, *supra*, 433 U.S. at 384; *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, *supra*, 425 U.S. at 772 n.24; *Porter & Dietsch, Inc.* v. *FTC*, *supra*, 605 F. 2d at 304-308.

[9]Although petitioners concede that an affirmative disclosure requirement is constitutional in at least some circumstances (Pet. 13, 15), they nevertheless rely on *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, *supra*, for the proposition that the Commission's power to impose prophylactic rules and affirmative disclosure requirements presents an unsettled question. Petitioners fail to cite or discuss this Court's more recent decisions in *Friedman* v. *Rogers*, *supra*, and *Ohralik* v. *Ohio State Bar Ass'n*, *supra*, and make only a passing reference to *National Society of Professional Engineers*, *supra*. See Pet. 16-17. In those cases, the Court concluded that the government may constitutionally prohibit certain kinds of commercial speech altogether or may otherwise "require that a commercial message appear in such a form . . . as [is] necessary to prevent its being deceptive." *Friedman* v. *Rogers*, *supra*, 440 U.S. at 10, 16. Likewise, every court of appeals that has considered the question has concluded that the First Amendment does not bar the Commission from imposing reasonable affirmative disclosure requirements in appropriate circumstances. See, *e.g.*, *Porter & Dietsch, Inc.* v. *FTC*, *supra*; *Warner-Lambert Co.* v. *FTC*, *supra*.

In light of the pervasive, deliberate, and persistent nature of petitioners' deceptive sales practices,[10] the court of appeals correctly sustained the Commission's order in this case. Petitioners intentionally deceived customers with respect to when and whether they would be confronted in their homes by encyclopedia salespersons. In particular, petitioners used "contests" and other promotional devices to mislead prospective customers. They also persistently and pervasively indoctrinated their salespersons to lie about the purpose of their visit and the fact that they were salespersons and to use various unfair and deceptive practices. Accordingly and in direct response to those egregious deceptions, the Commission reasonably required petitioners (1) to disclose in their future advertising that persons who respond will be

[10]The Commission found—and petitioners do not contest—that petitioners deliberately employed numerous deceptive, misleading and false sales techniques. Moreover, the kinds of deceptions at issue here have long been condemned and have been a persistent problem in the door-to-door retailing of encyclopedias. See, *e.g.*, *FTC* v. *Standard Education Society*, 302 U.S. 112 (1937); *Grolier, Inc.*, 91 F.T.C. 315, 476-501 (1978), remanded on other grounds, No. 78-2159 (9th Cir. Jan. 24, 1980); *The Crowell-Collier Publishing Co.*, 70 F.T.C. 977, 1010-1013, 1021-1026 (1966); *Basic Books, Inc.*, 56 F.T.C. 69, 79-80 (1959); *National Educators, Inc.*, 49 F.T.C. 1358, 1362-1363 (1953); *Nat'l Surveys and Educational Development Co.*, 47 F.T.C. 888, 894-895 (1951); *Americana Corp.*, 45 F.T.C. 32, 43-44 (1948); *General Surveys, Inc.*, 34 F.T.C. 1157, 1162-1163 (1942); *Holst Publishing Co.*, 24 F.T.C. 404, 414-415 (1937); *World Library Guild, Inc.*, 23 F.T.C. 598, 604-606 (1936); *American Academic Research Society*, 17 F.T.C. 419, 420-421 (1933); *Consolidated Book Publishers, Inc.* 14 F.T.C. 13, 18-19 (1930). Indeed, some of the deceptive practices that gave rise to this case—such as misrepresentations about special, limited discount offers based on a combination plan—have been the subject of previous Commission proceedings against petitioners. See *Encyclopaedia Britannica, Inc.*, 59 F.T.C. 24 (1961); *Encyclopaedia Britannica, Inc.*, 48 F.T.C. 1416 (1952). Rather than complying with the cease and desist orders issued in those cases, petitioners have persisted in and expanded their deceptive sales practices.

contacted by petitioners' salespersons and (2) to apprise prospective customers of the true purpose and identity of petitioners' salespersons. In short, based on the specific facts of this case, the Commission has reasonably "require[d] that [petitioners'] commercial message[s] appear in such a form * * * as [is] necessary to prevent [their] being deceptive." *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, *supra*, 425 U.S. at 772 n. 24. The Commission's order therefore does not abridge petitioners' First Amendment rights.[11] See, *e.g.*,

[11]Petitioners erroneously claim (Pet. 2, 9, 13-19) that the Commission has adopted a general policy of requiring affirmative disclosures in all deceptive practice cases, as an extension of the so-called "fencing-in" doctrine. See, *e.g.*, *FTC* v. *National Lead Co.*, 352 U.S. 419 (1957). The Commission's test in all cases is what form of order will be most effective to " 'cure the ill effects of the illegal conduct, and assure the public freedom from its continuance' * * *. Whether a 'broad' or 'narrow' order will be most effective depends, therefore, on the particular circumstances and needs of the case." *All-Luminum Products, Inc.*, 63 F.T.C. 1268, 1279 (1963). In proceedings involving concealment of relevant commercial information, the most obvious and effective remedy has often proved to be affirmative disclosures. See, *e.g.*, *Porter & Dietsch, Inc.* v. *FTC*, *supra*; *Warner-Lambert Co.* v. *FTC*, *supra*; *P.F. Collier & Son Corp.* v. *FTC*, 427 F. 2d 261 (6th Cir.), cert. denied, 400 U.S. 926 (1970); *J.B. Williams Co.* v. *FTC*, 381 F. 2d 884 (6th Cir. 1967); *Ward Laboratories, Inc.* v. *FTC*, 276 F. 2d 952 (2d Cir.), cert. denied, 364 U.S. 827 (1960); *Kerran* v. *FTC*, 265 F. 2d 246 (10th Cir. 1959). Such a requirement is particularly warranted here given petitioners' history of deliberate, repeated, and intrusive deceptions. See also note 10, *supra*.

Likewise, there is no merit to petitioners' contention (Pet. 27-29) that the order in this case exceeds the Commission's statutory authority. As the cases cited above demonstrate and as the court of appeals concluded (Pet. App. A9-A11), this order falls well within the Commission's discretion. See also *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611-613 (1946). That petitioners' sales may suffer as a result of the order merely reflects the pervasive nature of the deceptive techniques long practiced by petitioners and the materiality of the disclosures ordered by the Commission.

Friedman v. *Rogers*, *supra* (complete ban on all trade names); *Ohralik* v. *Ohio State Bar Ass'n*, *supra* (state may totally eliminate lawyers' in-person solicitations); *Porter & Dietsch, Inc.* v. *FTC*, *supra*; *National Comm'n on Egg Nutrition* v. *FTC*, *supra*; *Warner-Lambert Co.* v. *FTC*, *supra*.

2. Petitioners nonetheless claim (Pet. 19-26) that the court of appeals applied the wrong standard in reviewing the Commission's order in this case. Citing *Beneficial Corp.* v. *FTC*, 542 F. 2d 611 (3d Cir. 1976), cert. denied, 430 U.S. 983 (1977), petitioners suggest that the normal deference due the Commission with regard to its choice of remedies is inapplicable in the First Amendment—commercial speech context.[12] Instead, petitioners urge (Pet. 15, 20-23) that heightened judicial scrutiny, apparently in the nature of a least restrictive alternative test, is appropriate in this case. According to petitioners, if that test were applied to the order in this case, the court of appeals would have rejected the Commission's order. These claims are both legally and factually without merit.

In *National Society of Professional Engineers* v. *United States*, *supra*, this Court addressed the question

[12]Petitioners also argue (Pet. 24-26) that whatever is the standard in other situations, a special standard of review governs this case because Britannica is "a publisher engaged in the distribution of its publications." The cases and principles relied on by petitioners are inapposite, however, since the Commission has neither limited petitioners' publishing activities nor even indirectly affected the content of petitioners' publications. "The fact that the publisher handles news while others handle food does not * * * afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices." *Associated Press* v. *United States*, 326 U.S. 1, 7 (1945). See also *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

whether a district court's remedial order limiting commercial speech violated the First Amendment. The Court made clear that "[t]he standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct." 435 U.S. at 698. Accordingly, insofar as the Third Circuit adopted a least restrictive alternative analysis or other more searching standard in *Beneficial Corp.*, its approach has been rejected by this Court. See also *Friedman* v. *Rogers*, *supra*, 440 U.S. at 12 n.11 ("there is no First Amendment rule * * * requiring [the Commission] to allow deceptive or misleading commercial speech whenever the publication of additional information can clarify or offset the effects of the spurious communication"); *Ohralik* v. *Ohio State Bar Ass'n*, *supra*, 436 U.S. at 457 (limitation of in-person solicitation subject to "lower[ ] * * * level of * * * judicial scrutiny"). Cf. *Brown* v. *Glines*, No. 78-1006 (Jan. 21, 1980), slip op. 7.

In any event, the court of appeals expressly applied the more stringent *Beneficial Corp.* test to the Commission order in this case (see Pet. App. A13) and held that the Commission's remedies are "the least restrictive alternative which will adequately further the legitimate governmental interest of the prevention of deception" (*id.* at A15).[13] That conclusion is amply supported by the

[13]Petitioners incorrectly suggest (Pet. 22) a conflict between this decision and the Third Circuit's decision in *Beneficial Corp.* by pointing to the court of appeals' discussion of petitioners' statutory claim (Pet. App. A9-A11). The court of appeals' careful discussion of petitioners' First Amendment claim unequivocally applies the same standard that was adopted by the court of appeals in *Beneficial Corp.* See Pet. App. A12-A15. Indeed, the Seventh Circuit previously approved the *Beneficial Corp.* standard in *National Comm'n on Egg Nutrition* v. *FTC*, *supra*, 570 F. 2d at 164.

record. The breadth of petitioners' deliberate deceptions belies their suggestion that a cease and desist order is a sufficient remedy. Indeed, the cease and desist orders in prior cases against petitioners covered at least some of the sales deceptions that were found by the Commission in this case. See note 8, *supra*. Given the inherent potential for deception in the context of in-person solicitations (*Ohralik* v. *Ohio State Bar Ass'n*, *supra*, 436 U.S. at 457-458) and petitioners' longstanding policy of deceiving and lying to potential customers as part of their in-person sales presentations, the Commission was warranted in concluding that a printed disclosure truthfully identifying the salesperson and the purpose of his visit was necessary to terminate petitioners' illegal conduct. See Pet. App. A15, A157-A158, A160-A161.[14] Similarly, the Commission properly imposed a limited disclosure requirement on petitioners' future advertising so as to ensure informed decision-making by potential customers. See, *e.g.*, *Porter & Dietsch, Inc.* v. *FTC*, *supra*; *Warner-Lambert Co.* v. *FTC*, *supra*. Further review of these fact-specifc questions is unwarranted.

[14]Particularly in light of petitioners' prior bad faith and deliberate deceptions, there is little likelihood that the requirement of an oral disclosure would be an effective limitation on petitioner's unlawful sales practices. To the contrary, because deceiving a potential customer long enough to get in the door is a key to petitioners' sales strategy (Pet. 8 n.*; Pet. App. A160), there is every incentive to mislead and disguise the salesperson's identity and purpose. See *Ohralik* v. *Ohio State Bar Ass'n*, *supra*, 436 U.S. at 457.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-697

ENCYCLOPAEDIA BRITANNICA, INC. and
BRITANNICA HOME LIBRARY SERVICES, INC.,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

REPLY TO THE BRIEF OF THE FEDERAL TRADE COMMISSION IN OPPOSITION

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REPLY TO THE BRIEF OF THE FEDERAL TRADE COMMISSION IN OPPOSITION

I. THE WRIT SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION OF FIRST AMENDMENT LAW RAISED BY THE FTC'S CONTINUING PROGRAM OF AFFIRMATIVE DISCLOSURE ORDERS DICTATING THE CONTENT OF SPEECH.

The order at issue in this case is but a part of a broad Federal Trade Commission program of affirmative disclosure orders in deceptive advertising cases through which the FTC continues to regulate the content of commercial speech far beyond the minimum necessary to prevent deception. Nowhere in its response does the FTC contest this proposition.

The FTC implicitly concedes, as it must, that "affirmative disclosure requirements form the backbone of current FTC initatives . . ." against misleading advertising.* Indeed, there have been at least 44 such affirmative disclosure orders issued in recent years by the FTC, many of which require the advertiser to speak precise words chosen by the FTC. See Britannica Petition at pp. 16-17.

The FTC also implicitly concedes, as it must, that it has applied *and will continue to apply* its "fencing-in" doctrine in deceptive advertising cases without modification to meet the new requirements of *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976).** Misapplication of the "fencing-in" doctrine has been particularly noticeable under the FTC's affirmative disclosure program. Of the six other cases to reach the Court of Appeals in which affirmative disclosures were ordered by the FTC, five have resulted in partial or complete reversals. See Britannica Petition at p. 16.

When this Court held that commercial speech is entitled to First Amendment protection, it was anticipated that one of the most significant consequences would be in the FTC's regulation of deceptive advertising and particularly efforts by the

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* See *Consumer Information Remedies*, published by FTC staff, at p. 276, quoted in Britannica Petition at p. 17.

** The "fencing-in" doctrine, which was developed in antitrust cases, permits the FTC to prohibit not only the conduct found to be unlawful, but reasonably related conduct as well. When applied in the deceptive advertising field, the "fencing-in" doctrine results in orders which go far beyond what is necessary to prevent deception and consequently runs afoul of the commercial free speech doctrine. In its response the FTC affirmatively asserts the power to issue affirmative disclosure orders if the orders are a "reasonable method of eliminating . . . illegal conduct," FTC Brief in Opposition at p. 8, citing an antitrust decision as authority. *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978). Similarly, the FTC cites antitrust authority for the proposition that it enjoys discretion to decide "whether a 'broad' or 'narrow' order will be most effective. . . ." FTC Brief in Opposition at p. 10.

FTC to impose affirmative disclosure requirements. See Britannica Petition at p. 16. Thus, the Court has repeatedly mentioned in dictum the possibility that affirmative disclosure orders would be constitutional if "necessary to prevent deception." *Friedman* v. *Rogers*, 440 U. S. 1, 10, 16 (1979); *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 383-384 (1977); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U. S. 85, 98 (1978); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771-772 (1976). However, this Court has not yet taken a false advertising case or any case actually involving a commercial speech affirmative disclosure requirement; and the Court has never intimated, even in dictum, that any affirmative disclosure requirement could constitutionally go beyond the minimum necessary to prevent deception.

In light of the FTC's broad program of affirmative disclosure orders dictating the content of commercial messages, and in light of the FTC's persistent claim that it may continue, in the face of *Virginia State Board of Pharmacy* and repeated reversals by the courts of appeals, to utilize its broad "fencing-in" doctrine to structure commercial messages in ways not necessary to prevent deception, it is time for this Court to grant certiorari in an affirmative disclosure case and decide whether application of the "fencing-in" doctrine to advertising and other communications can survive the demise of the commercial free speech exception to the First Amendment.

This case presents an ideal vehicle. The order of the FTC below incontestably regulates the content of Britannica's speech and forces its salesmen to speak words of the FTC's choosing which are in no way necessary to prevent deception. Britannica salesmen are required under the order issued by the FTC to exhibit to each customer a Miranda warning-like card, the language on which would lead the consumer—in the words of the dissenting judge below—to conclude that the salesman is

"afflicted with some strange marketplace malady." No other salesmen in this country are required to exhibit such a card to prospective customers, and no one would suggest that the absence of such a card renders the sales presentations of these salesmen necessarily deceptive. This case is thus not only an example of the FTC's overbroad affirmative disclosure program, regulating the content of commercial speech far beyond what is necessary to prevent deception, it is a particularly egregious example of that program.*

II. THE WRIT SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE THIRD CIRCUIT'S DECISION IN BENEFICIAL CORP. AND THE DECISION BELOW ON THE APPROPRIATE SCOPE OF JUDICIAL REVIEW.

The FTC order in this case, which goes far beyond what is necessary in order to prevent deception, plainly escaped reversal at the hands of the Court of Appeals by reason of the deference which the court paid to the FTC—deference which in a commercial speech case places the Seventh Circuit squarely in conflict with the decision of the Third Circuit in *Beneficial Corp.* v. *FTC,* 542 F. 2d 611 (3rd Cir. 1976), *cert. denied,* 430 U. S. 983 (1977).

The conflict has recurred and been confirmed by a subsequent decision of the Seventh Circuit, *Porter & Dietsch, Inc.*

* The FTC asserts that certiorari should be denied because, prior to issuing its order, the FTC made a factual finding that Britannica salesmen had engaged in deceptive conduct. FTC Brief in Opposition at pp. 9, 13. The argument proves too much. Every affirmative disclosure order issued by the FTC will be based on such a finding. If such a finding were sufficient justification, all affirmative disclosure orders issued by the FTC would escape constitutional review.

The FTC also asserts that door-to-door commercial messages are special, relying on *Ohralik* v. *Ohio State Bar Ass'n.,* 436 U. S. 447 (1978). *Ohralik* involved a time-honored and almost universal rule prohibiting solicitation by an attorney, a profession subject to special regulation. *Ohralik* did not involve a regulation of the *content* of speech in any way.

v. *FTC,* 605 F. 2d 294, 304 (7th Cir. 1979), again adopting and applying in a commercial speech case the old "wide latitude" standard of judicial review which was explicitly rejected by the Third Circuit in *Beneficial Corp.* v. *FTC, supra.*

In *Beneficial Corp.* the Court of Appeals for the Third Circuit adopted two rules. First, it announced as a rule of substantive law that the FTC could not regulate commercial speech after *Virginia State Board of Pharmacy* except as "necessary to prevent deception." Second, it adopted a new, more exacting standard of judicial review to determine whether the FTC had in fact correctly applied the substantive rule of law. In its petition to this Court from the Third Circuit's decision, the FTC sought review *only* of the portion of the Third Circuit's opinion rejecting the old "standard of judicial review of remedies of administrative agencies," and adopting a new more exacting standard. In its opinion in the present case, the Seventh Circuit at least purported to apply the *Beneficial Corp.* rule of substantive law. However, *at the express urging of the FTC,* the Seventh Circuit adopted the old deferential standard of judicial review of remedies of administrative agencies in direct conflict with the rule in *Beneficial Corp.* See Britannica Petition at pp. 21-22.

In its response, the FTC makes two conflicting and flatly erroneous arguments to avoid the clear conflict between the Circuits. First, the FTC claims that *Beneficial Corp.*, in so far as it adopted a more exacting standard of judicial review of administrative agencies in First Amendment cases, has been overruled by three subsequent commercial speech decisions of this Court. *National Society of Professional Engineers* v. *United States,* 435 U. S. 679 (1978); *Ohralik* v. *Ohio State Bar Association,* 436 U. S. 447 (1978); *Friedman* v. *Rogers,* 440 U. S. 1 (1979). See FTC Brief in Opposition at pp. 11-12. The FTC is wrong. Not one of these cases involves the scope of review of a decision by an administrative agency. Not one involves the scope of review of anything. The most those

cases stand for is the uncontested proposition, clearly applicable when *Beneficial Corp.* was decided, that commercial speech receives less constitutional protection than other kinds of speech. It is beyond question that *Beneficial Corp.* has in no way been overruled, and that if an affirmative order of the FTC dictating the content of commercial speech arose today in the Third Circuit, it would receive the same exacting scrutiny applied by the Third Circuit in *Beneficial Corp.*

Second, the FTC argues that the Seventh Circuit opinion below does not conflict with but agrees with *Beneficial Corp.** The argument is disingenuous at best. The Seventh Circuit opinion agrees with *Beneficial Corp.* as to the substantive rule of law to be applied by the FTC. However, *the only part of the opinion below addressing scope of review* explicitly adopts, at the express urging of the FTC, the precise standard of review rejected by the Third Circuit in *Beneficial Corp.* and urged on this Court by the FTC in its petition for certiorari in that case.** See Britannica Petition at p. 22. Moreover, six days after the decision below, another panel of the Seventh Circuit expressly adopted and applied the same deferential standard of judicial review to another FTC order challenged on First Amendment grounds. *Porter & Dietsch, Inc.* v. *FTC*, 605 F. 2d 294, 304 (7th Cir. 1979).***

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* The FTC does not explain why, if *Beneficial Corp.* has been "overruled" by recent Supreme Court cases, the Seventh Circuit would apply the *Beneficial* standard.

** It is also clear that the Seventh Circuit, having stated that it would apply the deferential standard of review granting "wide latitude" to the FTC, proceeded in fact to do so. Thus the court made no effort, independently of the FTC's having concluded that the order was "required," to explain (nor does the FTC explain in its response) how the rigid and detailed specification of Britannica's communications could be "necessary to prevent deception." See Britannica Petition at p. 10.

*** The FTC's claim that the old deferential standard of review is applicable in the Seventh Circuit only to statutory claims, FTC

(Footnote continued on next page.)

The law of the Seventh Circuit thus clearly conflicts with the law in the Third Circuit on the precise and important issue raised by the FTC in a certiorari petition to this Court from the Third Circuit filed before the conflict developed. The conflict is still unresolved. This Court should grant the writ to resolve it.

III. THE WRIT SHOULD BE GRANTED BECAUSE THE FTC ORDER IS IN DIRECT CONFLICT WITH THE FIRST AMENDMENT PRINCIPLES APPLICABLE TO A GOVERNMENTAL RESTRAINT ON THE DISTRIBUTION OF PUBLICATIONS.

As set forth in the Britannica Petition at pp. 24-26, the FTC order against Britannica is in direct conflict with the fundamental First Amendment principles which apply to a governmental restraint on the distribution of publications. In response, the FTC makes no effort to defend the order under traditional First Amendment principles. Instead, the FTC asserts that "the cases and principles relied on by petitioners are inapposite . . . since the Commission has neither limited petitioner's publishing activities nor even indirectly affected the content of petitioner's publications." FTC Brief in Opposition at p. 11.

The FTC's assertion that the First Amendment protects only publication itself and the content of publications is simply wrong. The First Amendment protects "the free publication *and dissemination* of books," *Smith* v. *California*, 361 U. S. 147, 150 (1959) (emphasis added); freedom of speech and the press

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(Footnote continued from preceding page.)

Brief in Opposition at p. 12, is wholly unsupportable. As noted above, in the decision below the Seventh Circuit deals with the standard of judicial review only once, adopting the "wide latitude" standard at the outset of its opinion and then proceeding to apply that standard to all aspects of the case. In *Porter & Dietsch, Inc., supra*, the Seventh Circuit explicitly adopts, immediately prior to and in relation to its review of the First Amendment claims, the "wide latitude" standard of review rejected by the Third Circuit in *Beneficial Corp.* See 605 F. 2d at 304.

"includes . . . *the right to distribute,*" *Griswold* v. *Connecticut,* 381 U. S. 479, 482 (1965) (emphasis added). And "it is of course no matter that the dissemination takes place under commercial auspices." *Smith* v. *California, supra,* at p. 150. See Britannica Petition at pp. 24-25.

Ignoring those cases altogether, the FTC cites *Associated Press* v. *United States,* 326 U. S. 1 (1945), in which this Court held that the First Amendment gives newspaper publishers no general immunity from the anti-trust laws. Britannica seeks no similar immunity from any laws of general applicability. Rather, Britannica asserts that the First Amendment is fully and directly applicable to a specific severe governmental restraint on Britannica's distribution of its publication—a restraint which will inhibit and may prevent such distribution altogether in many cases. See Britannica Petition at pp. 4-5, 7-8.

The FTC also cites *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U. S. 376 (1973), in which this Court upheld an ordinance prohibiting newspaper classification of employment advertisements by sex. In *Pittsburgh Press,* however, this Court went out of its way to note explicitly that the publisher did not argue that the ordinance "impairs in any signficant way its ability to publish and distribute its newspaper." 413 U. S. at 383. Here, in contrast, it is precisely Britannica's ability to publish and distribute its publications which is at issue.

In failing to subject this order to the tests applicable under the First Amendment—tests by which the order is patently indefensible (see Britannica Petition at pp. 25-26)—the judgment below is in direct conflict with the decisions of this Court.

CONCLUSION.

For the reasons set forth above and in the Petition, a writ of certiorari should be granted.

Respectfully submitted,

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